1069

No. 2815

United States Circuit Court of Appeals

For the Ninth Circuit.

The AMERICAN BANK OF ALASKA, a corporation,

Plaintiff in Error,

vs.

G. JOHNSON, as Trustee in Bankruptcy in the Matter of T. MITCHELL & CO., a mining copartnership consisting of THOMAS MITCHELL, JAS. J. FALLON, and HERMAN FAWCETT, Bankrupts,

Defendant in Error,

Transcript of Record.

Upon Writ of Error from United States District Court for the Territory of Alaska, Fourth Division.

Press of Fairbanks Times, Fairbanks, Alaska

NO._____

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Due service and receipt of three copies hereof admitted this.....day of....., 1916.

.....

.....

Attorneys for Defendant in Error.

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Names and Addresses of Attorneys of Record.

JOHN KNOX BROWN, THOS. A. McGOWAN, JOHN A. CLARK, and McGOWAN & CLARK, Attorneys for Defendant and Plaintiff in Error, Fairbanks, Alaska.

THOMAS A. MARQUAM and LOUIS K. PRATT, Attorneys for Plaintiff and Defendant in Error, Fairbanks, Alaska.

In the United States District Court for the Territory of Alaska, Fourth Division.

No. 2011.

G. JOHNSON, as Trustee in Bankruptcy in the Matter of T. Mitchell & Co., a mining copartnership consisting of Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, Bankrupts,

Plaintiff,

vs.

THE AMERICAN BANK OF ALASKA, a corporation,

Defendant.

Stipulation Relative to Printing of Record.

It is hereby stipulated that, in printing the papers and records to be used on the hearing on writ of error in the above entitled cause, for the consideration of the United States Circuit Court of Appeals for the Ninth Circuit, the title of the Court and cause in full on all papers shall be omitted, except on the first

page of said record, and that there shall be inserted, in place of said title, in all papers used as a part of said record, the words "Title of Court and Cause"; also, that all indorsements on all papers used as a part of said record shall be omitted, except the clerk's filing marks and the admission of service.

Dated at Fairbanks, Alaska, on this twelfth day of April, A. D. one thousand nine hundred sixteen.

THOMAS A. MARQUAM,
LOUIS K. PRATT,
Attorneys for Plaintiff.
JOHN K. BROWN,
McGOWAN & CLARK,
Attorneys for Defendant.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div. Apr. 12, 1916. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

Praecipe for Transcript.

To J. E. Clark, Clerk of the above-entitled Court:

You will please prepare transcript of the record in the above entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, upon the writ of error heretofore perfected to said Court, and will include in said transcript the following documents, papers, and records, to-wit:

1. Amended complaint.
2. Demurrer to amended complaint.
3. Minute order overruling demurrer to amended

complaint.

4. Answer of defendant.
5. Supplemental answer of defendant.
6. Reply of plaintiff.
7. Bill of exceptions and order allowing and settling same.
8. Judgment.
9. Supplemental bill of exceptions and order allowing and settling same.
10. Assignment of error.
11. Petition for writ of error.
12. Order allowing writ of error and fixing supersedeas bond.

12a. Order relative to supersedeas bond on writ of error.

13. Writ of error.
14. Citation on writ of error.
15. Undertaking on writ of error and supersedeas with order approving same.
16. Designation of place for hearing writ of error.
17. Order extending time of docketing and entering writ of error with Clerk of Circuit Court of Appeals.
18. Stipulation relative to printing record.
19. Praecipe for transcript.

This transcript to be prepared as required by law and the orders and rules of this Court and of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the

Ninth Circuit, at San Francisco, California, on or before the thirty-first day of July, A. D. one thousand nine hundred sixteen, pursuant to the order of this Court extending time.

Dated at Fairbanks, Alaska, on this fourteenth day of April, A. D. one thousand nine hundred sixteen.

JOHN K. BROWN
McGOWAN & CLARK
Attorneys for Plaintiff in Error.

Due service of the foregoing praecipe for transcript and receipt of a copy thereof acknowledged this 14th day of April, A. D. 1916.

T. A. MARQUAM
LOUIS K. PRATT
Attorneys for Defendant in Error.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div. Apr. 14, 1916. J. E. Clark, Clerk, by L. F. Protzman, Deputy.")

[Title of Court and Cause.]

Amended Complaint.

Comes now the plaintiff above named and by leave of court first had and obtained, files this his amended complaint in the above entitled cause and alleges:

I.

That T. Mitchell & Co. were, on the thirty-first day of September, a mining co-partnership, composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, and were, on the 30 day of September, 1913, by the above entitled court, adjudged to be bankrupts

upon petition of creditors of said T. Mitchell and Co., and that the proceedings in bankruptcy were duly referred to W. H. Adams, referee in bankruptcy, residing in Fairbanks, Fourth Judicial Division, Territory of Alaska, and that said bankruptcy proceedings are still pending in the bankruptcy court of said referee.

II.

That thereafter and prior to the commencement of this action, such proceedings were had before said referee, that plaintiff was duly and regularly, by said referee, appointed trustee in bankruptcy in said bankruptcy proceedings, and that the plaintiff is now the duly appointed, qualified and acting trustee in bankruptcy, and as such trustee is entitled to the possession of all of the estate of said T. Mitchell & Co.

III.

That the defendant is a corporation duly organized and existing under the laws of the State of Washington; that its principal place of business is at the town of Fairbanks, Fourth Judicial Division, Territory of Alaska.

IV.

That within four months prior to the date of said order of adjudication, adjudging said T. Mitchell & Co. bankrupts, to-wit, on the thirty-first day of July, 1913, the said firm of T. Mitchell & Co. delivered into the possession of the defendant, at their place of business in said town of Fairbanks, certain gold

dust belonging to the said Firm of T. Mitchell & Co., which said gold dust was then of the value of $3,750.27.

V.

That at the time of the delivery of said gold dust to said defendant, as aforesaid, the said firm of T. Mitchell & Co. were indebted to said defendant in a sum greater than said sum of $3,750.27, to-wit, in the sum of about $4,096.04, which said indebtedness was, at the time of the delivery of said gold dust, past due.

VI.

That said defendant without any authority from said T. Mitchell & Co., or from any member of said firm, and without right, converted said gold dust and the whole thereof to its own use, and applied the value thereof, to-wit, the said sum of $3,750.27, toward the payment of said indebtedness of $4,096.04, which was then past due and owing from said firm of T. Mitchell & Co. to said defendant.

VII.

That said gold dust was so delivered into the possession of defendant by said T. Mitchell & Co., as above stated, with the intention on the part of said T. Mitchell & Co. of selling the same to defendant and depositing the proceeds of such sale to their credit in their general deposit account in said defendant bank, and having the same credited to their deposit account for the purpose of checking against the same to pay the wages of workmen, then work-

ing for said T. Mitchell & Co., as well as to pay the running expenses of the mining operations then conducted by said T. Mitchell & Co., and the said defendant unlawfully and without any right or permission, applied the whole value of said gold dust, to-wit, the said sum of $3,750.27 towards the payment of said indebtedness, then past due and owing, from said T. Mitchell & Co., to defendant as above stated, and that said defendant immediately, after ascertaining the value of said gold dust, notified said T. Mitchell & Co. that it had applied the whole value of said gold dust, to-wit, the said sum of $3,750.27 toward the payment of their past indebtedness, and then and there notified said T. Mitchell & Co. that they would not honor any checks against said amount, and that said T. Mitchell & Co. were not permitted by said defendant, at any time, to check against the same, and that at no time was the value of said gold dust, or any part thereof, placed to the deposit account of said T. Mitchell & Co. in the defendant bank, so as to entitle said T. Mitchell & Co. to check against the same, or any part thereof.

VIII.

That at the time of the delivery of said gold dust to said bank, by said bankrupts, as above stated, said bankrupts, to-wit, T. Mitchell & Co., composed of the firm of Thomas Mitchell, James J. Fallon and Herman Fawcett, were justly and lawfully indebted to different persons, in an aggregate sum far exceeding the value of the estate of said firm together with that

of, and each of, the individual members thereof, and that said firm were, and each of its members was at said time, insolvent, and the said defendant well knew, at said time, that said firm of T. Mitchell & Co. were wholly insolvent, or had reasonable cause to believe they were insolvent, and that defendant well knew at the time of receiving the said gold dust, and at the time of applying the same, or its value, to the payment of the past indebtedness then due, defendant would and did effect a preference whereby defendant would receive a larger percentage of the indebtedness due it from said bankrupts than the other creditors of the said bankrupts of the same class, and that said defendant at said time had reasonable cause to believe that the application of said gold dust, or its value to its past due indebtedness, would effect such preference, and that the same was so applied by said defendant with the purpose of procuring such preference.

IX.

That the entire value of the estate of said T. Mitchell & Co., bankrupts, is, and ever since, prior to the thirty-first day of July, 1913, was wholly together with the estate of each of the individual members thereof, insufficient to pay the lawful indebtedness of said firm, and that the retention by said defendant of said sum of $3,750.27 would pay to defendant a much greater percentage of the indebtedness due to defendant from said T. Mitchell & Co., than would be received by any of the other creditors of the said

T. Mitchell & Co. of the same or any class.

X.

That the plaintiff prior to the commencement of this action, demanded of defendant said gold dust or said sum of $3,750.27 the value thereof, but the said defendant refused to deliver said gold dust or to pay any portion of said sum to plaintiff.

WHEREFORE:

Plaintiff as such trustee in bankruptcy, prays judgment against defendant for the sum of $3,750.27, together with interest thereon at the legal rate, from the thirty-first day of July, 1913, together with his costs and disbursements herein expended.

R. F. ROTH,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

G. Johnson, being first duly sworn, deposes and says: That he is the plainitff as trustee in bankruptcy in the matter of the bankruptcy of T. Mitchell & Co.; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowldege as he verily believes.

G. JOHNSON.

Subscribed and sworn to before me this 17th day of June, 1914.

JOHN A. CLARK,
Notary Public for Alaska.
My commisison expires Apr. 24, 1918.

Service of the foregoing amended complaint admitted and a true copy thereof received this 18 day of June, 1914.

McGOWAN & CLARK,
Attorneys for Defendant.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div. Jun 18, 1914. Angus McBride, Clerk, by P. R. Wagner, Deputy.

[Title of Court and Cause.]

Demurrer to Amended Complaint.

Now comes the above named defendant, the American Bank of Alaska, a corporation, by its attorneys, Messrs. McGowan & Clark and John K. Brown, and demurs to the amended complaint of the plaintiff herein, upon the ground and for the reason that said amended complaint does not state facts sufficient to constitute a cause of action.

Fairbanks, Alaska, June 22, 1914.

McGOWAN & CLARK
JOHN K. BROWN
Attorneys for Defendant.

Due service of the within demurrer and receipt of a copy thereof are hereby acknowledged this 22d day of June, 1914.

R. F. ROTH,
Attorney for Defendant.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., Jun 23, 1914. Angus McBride, Clerk, by P. R. Wagner, Deputy.")

(Title of Court and Cause.)

General October 1913 Term. One hundred eighty-third court day. Monday, September 14, 1914.

Order Overruling Demurrer.

Now on this day came on for hearing defendant's demurrer to the amended complaint herein, R. F. Roth appearing in behalf of plaintiff, John K. Brown in behalf of defendant; after argument thereon by the respective attorneys, and the Court being fully and duly advised in the premises,

IT IS ORDERED that said demurrer be, and the same is, hereby overruled, and defendant allowed ten days within which to file his answer herein.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 13, page 14.

[Title of Court and Cause.]

Answer to Amended Complaint.

Now comes the above named defendant, American Bank of Alaska, by McGowan & Clark and John K. Brown, its attorneys, and for answer to the amended complaint herein:

I.

Denies each and every allegation contained in paragraph VI thereof, except that said defendant admits that on or about August 1, 1913, it set off the deposit to the credit of T. Mitchell & Co., named in said amended complaint, which deposit was on the books of said defendant in the amount of $3,750.27,

against the past due indebtedness then due and owing from said firm of T. Mitchell & Co. to said defendant, in the sum of $4,096.04 besides interest thereon.

II.

Answering paragraph VII thereof, admits that the gold dust mentioned in said amended complaint was delivered to the defendant by said T. Mitchell & Co., with the intention on the part of said T. Mitchell & Co. of selling same to defendant and depositing the proceeds of such sale to the credit of said T. Mitchell & Co. in its general deposit account at the bank of said defendant, and having same credited to the deposit account of said T. Mitchell & Co., and this defendant denies each and every other allegation contained in said paragraph VII.

III.

Answering paragraph VIII thereof, this defendant denies any knowledge or information sufficient to form a belief as to whether or not at the time of the delivery of said gold dust to said bank by said firm of T. Mitchell & Co., the said firm was justly and lawfully indebted to different persons, in an aggregate sum far exceeding the value of the estate of said firm, together with that of the individual members thereof; and denies any knowledge or information as to whether or not said firm was, and each of its members was at said time insolvent; and this defendant further denies each and every other

allegation contained in paragraph.

IV.

Denies each and every allegation contained in paragraph IX thereof.

For a further, separate and affirmative defense to the said amended complaint, this defendant alleges:

I.

That at the times mentioned in said amended complaint and herein mentioned, the defendant was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and engaged in carrying on a general banking business in the Town of Fairbanks, Territory of Alaska;

II.

That prior to, and some time subsequent to the first day of August, 1913, the firm of T. Mitchell & Co. was a mining copartnership, composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, engaged in carrying on a general placer mining business in the Fairbanks Mining and Recording Precinct, Fourth Judicial Division, Territory of Alaska.

III.

That on the 31st day of July, 1913, the said firm of T. Mitchell & Co. was indebted to this defendant in the sum of $4,096.04 on account of overdrafts made by said firm of T. Mitchell & Co. upon its account with the said defendant, and on account of promissory notes theretofore executed by the said firm of T. Mitchell & Co., payable to this defendant,

which said amount of $4,096.04 is exclusive of any interest due thereon.

IV.

That on or about July 31, 1913, the said firm of T. Mitchell & Co. sold and delivered to this defendant gold dust of the value of $3,750.27 and directed that the said amount be placed to the credit of said firm upon the deposit books of this defendant, and this defendant thereupon on August 1, 1913, caused the said firm of T. Mitchell & Co. to be credited with said amount.

V.

That on said August 1, 1913, this defendant, with the knowledge and consent of the said firm of T. Mitchell & Co., set off against the said indebtedness of said firm of T. Mitchell & Co. to this defendant the said amount of $3,750.27, so as aforesaid deposited to the credit of said firm of T. Mitchell & Co. from the proceeds and purchase price of the said gold dust, so as aforesaid purchased from said firm by this defendant.

VI.

That at the time of the setting off of said deposit to the credit of said firm of T. Mitchell & Co. against the amount of $4,096.04, due and owing as aforesaid from said firm to said defendant, neither said defendant nor any of its officers knew, or had any reasonable cause to believe, that said firm of T. Mitchell & Co., or any of its members, was insolvent, and that at said time neither this defendant, nor any of

its officers, knew, or had any reasonable cause to know or believe, that the setting off of the said amount on deposit as aforesaid, to the credit of T. Mitchell & Co., against the indebtedness of said firm of T. Mitchell & Co. to this defendant would effect a preference, whereby this defendant would receive a larger percentage of the indebtedness due it from the said firm of T. Mitchell & Co. than the other creditors of said firm, of the same class, or any other class, would receive, and the said set-off was made as aforesaid, of said deposit against said indebtedness, without any purpose of securing such preference, or any other preference over and above any other creditor of said firm of T. Mitchell & Co.

WHEREFORE this defendant demands judgment that the plaintiff take nothing by his said action, and that defendant recover from plaintiff its costs and disbursements herein.

McGOWAN & CLARK
and
JOHN K. BROWN
Attorneys for Defendant.

United States of America,
Territory of Alaska,—ss.

C. J. Hurley, being first duly sworn, on oath deposes and says that he is President of American Bank of Alaska, the defendant in the above entitled action; that he has read the foregoing answer, knows the contents thereof, and the same is true as he verily believes.

C. J. HURLEY.

Subscribed and sworn to before me this October 20, 1914.

(Seal) JOHN A. CLARK,
Notary Public for Alaska.
My commission expires Apr. 24, 1918.

Due service of the within answer and receipt of a copy thereof are hereby asknowledged this 20th day of October, 1914. R. F. Roth, Attorney for Plaintiff.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., Oct. 20, 1914. Angus McBride, Clerk.")

(Title of Court and Cause.)

Supplemental Answer.

Comes now the defendant, and by leave of the Court first had and obtained, and for answer to paragraphs one and two of plaintiff's amended complaint, admits and denies as follows, to-wit:

Denies each and every matter and thing contained in paragraphs one and two of said amended complaint, save and except that defendant admits that T. Mitchell and Company, on the thirty-first day of December, A. D. one thousand nine hundred thirteen, was a mining copartnership composed of Thomas Mitchll, James J. Fallon, and Herman Fawcett.

McGOWAN & CLARK,
Attorneys for Defendant.

United States of America,
Territory of Alaska,—ss.

A. Bruning, being first duly sworn, deposes and says that he is the Cashier of American Bank of Alaska, the defendant above named,; that he has read the foregoing supplemental answer, knows the contents thereof, and verily believes the same to be true.

A. BRUNING.

Subscribed and sworn to before me on this 30th day of October, 1915.

(Seal) JOHN A. CLARK,

Notary Public in and for the Territory of Alaska.

My commission expires 24 April, 1918.

Due service hereof admitted this Oct. 30, 1915. T. A. Marquam, Attorney for Plff.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div. Oct. 30, 1915. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Reply.

Now comes the plaintiff, above named, and replies to the answer to amended complaint, on file herein, as follows:

I.

Replying to paragraph 5 of the further, separate and affirmative defense denies that defendant set off against the said indebtedness of said firm of T. Mitchell & Co. to defendant the amount of $3,750.27, with the knowledge or consent of said firm of T.

Mitchell & Co., or with the knowledge or consent of any member of said firm of T. Mitchell & Co., on the 1st day of August, 1913, or at any other time.

II.

Denies each and every allegation contained in paragraph 6 of said further, separate and affirmative defense, and the whole thereof.

WHEREFORE plaintiff demands judgment as prayed for in his amended complaint on file herein.

R. F. ROTH,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

G. Johnson, being first duly sworn, on oath, deposes and says: That he has read the foregoing reply, knows the contents thereof, and the same is true as he verily believes.

G. F. JOHNSON.

Subscribed and sworn to before me this 17th day of May, 1915.

(Seal) HARRY E. PRATT,
Notary Public in and for Alaska.
My commission expires June 24th, 1916.

Service of a copy of the within Reply admitted this 22nd day of May, 1915. McGowan & Clark, John K. Brown, Attorneys for Defendant.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., Jun 2, 1915. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Bill of Exceptions.

This case came on regularly for trial before the Court, Honorable Charles E. Bunnell, Judge, presiding, at 10 o'clock, a. m., on Saturday, 30 October, 1915, Thomas A. Marquam, esq., and Louis K. Pratt, esq., appeared as attorneys for plaintiff, and Messrs. McGowan & Clark, and John K. Brown, esq., appeared as attorneys for defendant. Proceedings were taken to impanel a jury, and a jury of twelve men was accepted and sworn to try the case.

Thereafter, Mr. Marquam made an opening statement in behalf of plaintiff and Mr. Brown made an opening statement in behalf of defendant, and thereafter the trial of the case was continued from day to day until finally closed. During the trial the following proceedings were had, evidence taken, objections made, and exceptions taken:

GEORGE JOHNSON, sworn as a witness for plaintiff, testified as follows:

Direct Examination, by Mr. Marquam:

I am the plaintiff in this case as Trustee for the bankrupt firm of Mitchell & Co.

Q. When were you appointed such trustee and by whom?

(Objection. No answer given.)

Q. When were you appointed?

A. On the 16th of October, 1913.

Q. Is this your appointment from the referee of

the bankrupt? (Exhibiting paper to witness.)

A. Yes sir.

Mr. Marquam: We offer that in evidnce.

Mr. Clark, for defendant, objects as no foundation has been laid, no evidence before the Court that there was ever a petition filed or proper proceedings instituted to give the Court jurisdiction, or that the bankrupts were brought before the Court, or that they were ever adjudged bankrupts, or that the referee in bankruptcy ever acquired jurisdiction or had any authority to appoint this man trustee, or that he ever qualified as such trustee, or that he is now or was at the time of the institution of this suit the duly appointed, qualified, and acting trustee of said estate.

Objection overruled.

Exc. 1.

Defendant excepts, and an exception is allowed.

(The paper is marked "Plaintiff's Exhibit E" and is as follows:

PLAINTIFF'S EXHIBIT 'E.'

In the District Court of the United States, Fourth Division, Territory of Alaska.

In the matter of T. Mitchll & Co., Bankrupts.

In Bankruptcy. Notice of appointment of trustee.

To G. F. Johnson, of Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska.

I hereby notify you that you were duly appointed Trustee of the estate of the above named bankrupts

at the first meeting of the creditors on the 16th day of October, A. D. 1913, and I have approved such appointment. The penal sum of your bond as such trustee has been fixed at One Thousand Dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated: At Fairbanks, Alaska, October 16th, 1913.

W. H. ADAMS,

Referee in Bankruptcy.

(Endorsed: "No. 2011. Pltfs Exhibit E. G. Johnson Trustee Plaintiff vs. Amer Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska, 4th Div., Nov. 1, 1915. J. E. Clark, Clerk. by Sidney Stewart, Deputy.")

We offer in evidence the files in T. Mitchell & Co., bankrupts, No. 49-b, on file in the District Court.

(Defendant objects as too general. Objection sustained.)

Then we first introduce the creditors' petition to have the firm of T. Mitchell & Co. adjudged bankrupt.

(Defendant makes no objection. Admitted in evidence, marked "Plaintiff's Exhibit A," and is as follows:)

PLAINTIFF'S EXHIBIT 'A.'

In the District Court for the Territory of Alaska, Fourth Judicial Division.

CREDITORS' PETITION

To the Hon. Frederic E. Fuller, Judge of the District

Court of the United States for the Fourth Judicial Division, Territory of Alaska:

The petition of R. Donaldson, of M. Kelly, of Peter Campbell, of James G. McCann and Peterson Mortenson, respectfully shows:

That T. Mitchell, J. J. Fallon and Herman Fawcett, copartners under the firm name of "T. Mitchell & Co." of Ester Creek, Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, have for the greater portion of six months next preceding the date of filing this petition, had their principal place of business at said Ester Creek, and owe debts to the amount of more than one thousand ($1,000.00) Dollars;

That your petitioners are creditors of said T. Mitchell, J. J. Fallon and Herman Fawcett, copartners under the firm name and style of T. Mitchell & Co., having proof the claims amounting in the aggregate in excess of securities held by them to the sum of more than five hundred ($500.00) Dollars:

That the nature and amount of your petitioners' claims are as follows: The claim of R. Donaldson is for the sum of One Hundred ($100.00) Dollars for work and labor performed for the said T. Mitchell & Co., as a placer miner on a placer mining claim on said Ester Creek; the claim of M. Kelly is for the sum of Four Hundred Four ($404.00) Dollars for work and labor performed for said T. Mitchell & Co.,on said Ester Creek; the claim of Peter Campbell

is for the sum of Ninety-nine ($99.00) Dollars for work and labor performed as a placer miner on said Ester Creek; that the claim of James McCann is for the sum of One Hundred Eighty-two ($182.00) Dollars for work and labor performed on placer mining claim on said Ester Creek; the claim of Peter Mortenson is for the sum of One Hundred ($100.00) Dollars and is for work and labor performed on placer mining claim on said Ester Creek. All of which said work and labor was performed by said creditors within the period of six months from the date hereof and was performed at the special instance and request of the said T. Mitchell & Co., and that said T. Mitchell & Co. agreed to pay to said creditors for such work and labor the sums herein claimed by each of said creditors.

And your petitioners further represent that the said T. Mitchell, J. J. Fallon and Herman Fawcett and as such firm of T. Mitchell & Co., are insolvent, and that within four months next preceding the date of this petition the said T. Mitchell, J. J. Fallon and Herman Fawcett as such firm of T. Mitchell & Co., and individually, committed an act of bankruptcy in that each of them did heretofore, to-wit: on the 21st day of August, 1913, in writing, admit their inability individually and as a partnership to pay their debts either individually or as a copartnership, and in which writing they did admit their willingness to be adjudged bankrupts on that ground, a copy of which admission, signed by said debtors, is hereunto at-

tached and made a part of this petition.

Wherefore your petitioners pray that service of this petition with a subpoena may be made upon T. Mitchell, J. J. Fallon and Herman Fawcett as provided in the Act of Congress relating to bankruptcy and that they as copartners under the firm name and style of T. Mitchell & Co., may be adjudged by the Court to be bankrupts within the purview of said acts.

MIKE KELLY,
JAMES G. McCANN,
R. DONALDSON,
P. MORTENSON,
PETER CAMPBELL.

.....
Attorney.

United States of America,
Fourth Judicial Division,
District of Alaska,—ss:

R. Donaldson, M. Kelly, Peter Campbell, James G. McCann and Peter Mortenson, being five of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition subscribed by them are true, before me 22nd August, 1913.

(SEAL) C. E. WRIGHT,
Notary Public in and for Alaska.
Commission Exp. Oct. 15, 1913.

Fairbanks, Alaska, Aug. 21, 1913.

R. Donaldson, M. Kelly, Peter Campbell, James McCann, and Peter Mortenson, Creditors of T. Mitchell & Co.,

Gentlemen:

It is impossible for us to comply with your demand for payment of the amounts that we owe you and we, therefor, hereby admit our inability to pay our debts either as a partenership or individually, and each of the members of said partnership, together with said firm, hereby admit their inability to pay our debts and we hereby state that we are willing to be adjudged bankrupts on that ground.

Your truly,

T. MITCHELL & CO.
By JAMES J. FALLON,
THOMAS MITCHELL,
HERMAN FAWCETT,
JAMES J. FALLON.

(Endorsed: "Orig. No. 49 B. In the District Court For the Territory of Alaska, Fourth Division. In the Matter of T. Mitchell & Co. Creditors' Petition in Bankruptcy, R. F. Roth, Attorney for. . . . Fairbanks, Alaska." "Filed in the District Court, Territory of Alaska, 4th Div. Aug. 23, 1913, C. C. Page Clerk by C. C. Heid Deputy." "No. 2011 Pltfs Exhibit A. G. Johnson Trustee Plaintiff vs. Am. Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska, 4th Div. Nov. 1. 1915, J. E. Clark Clerk By Sidney Stewart Deputy.")

I now offer in evidence the adjudication.

(Defendant objects as no foundation has been laid to show that the Court acquired any jurisdiction of the parties, or had any authority to make the ad-

judication. It is an involutary bankruptcy proceeding, and it must be shown that the parties were duly summoned to appear and all formalities of law complied with, before the Court could acquire jurisdiction of the persons or property of the estate; that a mere adjudication is nothing unless the preliminary steps had been taken. Argument; whereupon Mr. Marquam makes the following offer:)

Here is the order for the appearance. We offer that in evidence. The fact that they have appeared, and the parties are before the Court, is sufficient evidence that the Court acquired jurisdiction.

(Defendant objects to its introduction as being a paper not required by law to be signed by the Court, and it should be disregarded because it is contrary to law; the citation to appear is immaterial. Argument. Objection overuled, and said order is admitted in evidence, marked "Plaintiff's Exhibit B.", and is as follows:)

PLAINTIFF'S EXHIBIT 'B.'

In the District Court for the Territory of Alaska, Fourth Judicial Division.

In the Matter of T. Mitchell & Co., a Mining Copartnership composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, Bankrupts.

No. 49-B.

Order for Appearance In Bankruptcy.

Upon considering the petition of James G. Mc-

Cann and others that Thomas Mitchell, James J. Fallon and Herman Fawcett, copartners under the name and style of T. Mitchell & Co., be declared bankrupts, it is ordered that the said T. Mitchell, James J. Fallon, Herman Fawcett do appear at this Court, as a Court of bankruptcy to be held on Saturday, the 27th day of September, 1913, at ten o'clock A. M. of said day, and show cause, if any there be, why the prayer of said petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ of subpoena be served on said T. Mitchell, James J. Fallon and Herman Fawcett, by delivering the same to them personally or by leaving the same at their last usual place of abode in said District at least five days before the day aforesaid.

Dated this 20th day of September, 1913.

F. E. FULLER,

Judge of said District Court.

Entered in Court Journal No. 12, page 673.

(Endorsed: "Orig. In Bankruptcy. No. 49-B. In the District Court for the Territory of Alaska, Fourth Division. In the Matter of T. Mitchell & Co., a mining copartnership composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, Bankrupts. Order for Appearance. R. F. Roth Attorney for Bankrupts, Fairbanks, Alaska." Filed in the District Court Territory of Alaska, 4th Div., Sep. 20, 1913, C. C. Page Clerk, By P. R. Wagner, Deputy." "No.

2011 Pltfs Exhibit B, G. Johnson Trustee Plaintiff vs. Am Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska, 4th Div. Nov. 1, 1915, J. E. Clark Clerk, By Sidney Stewart, Deputy.")

Exc. 2.

(Defendant excepts, and is allowed an exception.)

I now offer the schedules.

(Defendant objects on the ground that the schedules are irrelevant, incompetent, and immaterial, no authority shown for the filing of the schedules; furthermore, the file-mark shows that they were filed before the return-day named in the order; that no jurisdiction of the persons or property had ever been acquired by the Court by the issuance of a summons and the appearance of the defendants in Court; and for the further reason that no evidence has been introduced in this Court to show that these parties have filed an appearance in this Court. Objection overruled.

Exc. 3.

Defendant excepts and is allowed an exception. Schedule marked as "Plaintiff's Exhibit C", and is as follows:)

SYNOPSIS OF PLAINTIFF'S EXHIBIT 'C.'

In the District Court for the Territory of Alaska, Fourth Judicial Division.

In the Matter of T. Mitchell & Co., a mining co-partnership composed of Thomas Mitchell, James

J. Fallon and Herman Fawcett, Bankrupts.

No.

In Bankruptcy.

Schedule A. Statement of all Debts of Bankrupts.

Schedule A. (1). Statement of all Creditors who are to be paid in full, or to whom Priority is secured by Law:

(1) Taxes and debts due and owing to the United States .....None.

(2) Taxes due and owing to the district or to any county or municipality.....None.

(3) Wages due workmen, clerks or servants in an amount not exceeding $300.00 each earned within three month before filing the petition:

(Here follows a list of 60 laborers, with the amounts owing to them respectively, all of which indebtedness is alleged to have been contracted by T. Mitchell & Co. between 1 April, 1913 and 31 July, 1913, for which there is no ledger reference or voucher, the aggregate amount of said claims being $6,773.00

(4) Other debts having priority by law....None

THOMAS MITCHELL,
HERMAN FAWCETT,
JAMES J. FALLON,
Debtors

Schedule A. (2).

Creditors holding securities .....None.

THOMAS MITCHELL,

HERMAN FAWCETT,
JAMES J. FALLON,
Debtors.

Schedule A. (3). Creditors whose claims are unsecured.

(Here follows a list of 32 creditors, with the amounts due them set after their respective names, there being no ledger reference or voucher. All said claims are alleged to have been contracted in the year 1913 for various items other than labor, the aggregate amount of said claims being).....$7,532.75

(Among said accounts is the account of the American Bank of Alaska, set forth above in said schedule in the following words:

"No ledger reference or voucher. The creditor is American Bank of Alaska, a corporation whose residence and principal place of business is Fairbanks, Alaska. The indebtedness was contracted at Fairbanks, Alaska, in 1913, cash advanced, for the mining partnership of T. Mitchell & Co.....$345.87.")

THOMAS MITCHELL,
HERMAN FAWCETT,
JAMES J. FALLON,
Debtors.

Referring to the item of $345.87 due the American Bank of Alaska, as per statement of said Bank, which balance was arrived at in the following manner: On the 31st day of July, 1913, T. Mitchell & Co., owed to said Bank $4,095.87, $1,350.00 of which

was on four separate promissory notes: one for $850.00, two for $200.00 each and one for $100.00, and the balance of $2,745.87 upon an over-draft, and that upon the 31st day of July, 1913 said bankrupts took to said Bank gold dust of the value of $3,750.27, and that said Bank applied said sum of $3,750.27 in payment of their indebtedness as above stated; but did not place the same to the credit of said bankrupts so that the said bankrupts could check against the same, and that said bankrupts were not permitted to check against any part of said sum of $3,750.27.

THOMAS MITCHELL,
HERMAN FAWCETT,
JAMES J. FALLON,
Debtors.

Schedule A. (4) Liabilities on Notes or Bills Discounted which ought to be paid by the Drawers, Makers, Acceptors, or Indorsers.....None.

THOMAS MITCHELL,
HERMAN FAWCETT,
JAMES J. FALLON,
Debtors.

Schedule A. (5) Accommodation Paper..None.

THOMAS MITCHELL,
HERMAN FAWCETT,
JAMES J. FALLON,
Debtors.

Oath to Schedule A.

United States of America,
District of Alaska,—ss:

On this 3rd day of September, A. D. 1913, before me personally came Thomas Mitchell, Herman Fawcett, James J. Fallon, as members of the mining partnership of T. Mitchell & Co., the mining partnership mentioned in the foregoing Schedule, and the persons who subscribed to said schedule, and who, being by me first duly sworn, did each declare the said schedule to be a statement of all the partnership debts of said T. Mitchell & Co., in accordance with the acts of Congress relating to bankruptcy.

Subscribed and sworn to before me this 31st day of September, A. D. 1913.

(SEAL) RICHARD H. GEOGHEGAN,
Notary Public in and for Alaska.
My commission expires 24 Aug., 1914.

Schedule B. (1). Statement of All Property of Bankrupts. Real Estate.

There is no real property belonging to the firm of T. Mitchell & Co., the bankrupts herein named, and said firm did not within four months of the filing of the petition herein own any real estate of any kind or character whatever. The following described real property is owned by James J. Fallon, one of the members of said firm and one of the bankrupts herein named:

An undivided one-third interest in and to that certain placer mining claim known and described as the Olive Association on Little Eldorado Creek, a tributary of the Chatanika River in said Precinct, which association covers 4 Above Creek Claim and 4 Above

first tier, right limit, of the estimated value of $500.00.

Placer Mining Claim No. 7 above first tier of benches, right limit on Fairbanks Creek, a tributary of Fish Creek, in said Precinct, the estimated value .....$1,~~500~~ 500

$1500.00

And that there are no incumbrances upon either of said mining claims.

THOMAS MITCHELL,
HERMAN FAWCETT.
JAMES J. FALLON,
Debtors.

Schedule B. (2). Personal Property.

All of the following described personal property situated on the Hoffman fraction, near Ester City, on Ester Creek, said Precinct; all of which is under attachment in an action brought in the Commissioner's Court, said Precinct, by Roy Rutherford vs. T. Mitchell & Co., to-wit: (of the estimated value of the amount set opposite each particular item:)

(Here follows an itemized list of certain personal property, consisting in appliances for mining, supplies, etc., under each item the value thereof being set forth, and amounting in the aggregate to)..$1786.00

A. Cash on Hand.....None.

b. Bills of exchange, promissory notes, or securities of any description.....None

c. Stock in Trade .....None

d. Household goods and furniture, house-

hold stores, wearing apparel and ornaments of the person, except as above stated ..... None

e. Books, prints, and pictures..... None

f. Horses, cows, sheep, and other animals.. None

g. Carriages and other vehicles..... None

h. Farming stock and implements of husbandry ..... None

i. Shipping, and shares in vessels..... None

k. Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated (except as above stated).. None

l. Patents, copyrights, and trademarks..... None

m. Goods or personal property of any other description, with the place where each is is situated (except as above stated)..... None

Said firm of T. Mitchell & Co., deposited with the American Bank of Alaska, on the 31st day of July, 1913, gold dust mined from said Hoffman Fraction to the value of $3750.27, which gold dust was by the Bank applied to the indebtedness then past due from said T. Mitchell & Co., which indebtedness consisted of $1350.00 in promissory notes and $2745.87 in an overdraft; but no part of the proceeds of said gold dust was by said Bank placed on deposit for said T. Mitchell & Co., and was at no time subject to be checked against by said T. Mitchell & Co.,

. Total....$1786.00

THOMAS MITCHELL,

HERMAN FAWCETT,

JAMES J. FALLON,
Debtors.

Schedule B. (3). Choses in Action

(a) Debts due Debtors on open account...None

(b) Stocks in incorporated companies, interest in joint companies, and negotiable bonds None

(c) Policies of insurance.....None

(d) Unliquidated claims of every nature, with their estimated value.....None

(e) Deposits of money in banking institutions and elsewhere (except as above stated)..None

Total..$ None

THOMAS MITCHELL,
HERMAN FAWCETT,
JAMES J. FALLON,
Debtors.

Schedule B. (4) Property in Reversion, Remainder, or Expectancy, including Property held in Trust for the Debtors or subject to any Power or Right to dispose of or to Charge

There is no interest in land or in personal property or property in money, stocks, shares, bonds, annuities or rights or powers or legacies or bequests, and no property that was heretofore conveyed for benefit of creditors. And there has been no sum or sums paid to counsel for services rendered or to be rendered in this bankruptcy.

Total....None

THOMAS MITCHELL,
HERMAN FAWCETT,

JAMES J. FALLON,
Debtors.

Schedule B. (5). A particular statement of the Property claimed as exempted from the operation of the acts of Congress relating to Bankruptcy, giving each item of Property and its Valuation, and if any portion of it is Real Estate, its Location, Description, and present Use.

Neither of said debtors claim any property as exempt from the operation of any of the Acts of Congress relating to Bankruptcy; or otherwise....None

Total....None

THOMAS MITCHELL,
HERMAN FAWCETT,
JAMES J. FALLON,
Debtors.

Schedule B. (6). Books, papers, deeds, and writings relating to bankrupts' business and estate.

The following is a true list of all books, papers, deeds. and writings relating to our trade, business, dealings, estate, and effects, or any part thereof, which, at the date of this petition, are in our possession or under our custody and control, or which are in the possession or custody of any person in trust for us, or for our use, benefit, or advantage; and also of all others which have been heretofore, at any time, in our possession, or under our custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books. The only book of account kept by the debtors was the day book showing the transactions of the business of the firm of T. Mitchell & Co., also the time books showing the true time of the men who worked for said firm. Also receipts and bills.

Deeds, (none).....None

Papers .....None

THOMAS MITCHELL,
HERMAN FAWCETT,
JAMES J. FALLON,
Debtors.

Oath to Schedule B.

United States of America,
District of Alaska,—ss:

On this 3rd day of September, A. D. 1913, before me personally came Thomas Mitchell, Herman Fawcett, James J. Fallon, as members of the mining partnership of T. Mitchell & Co., the mining partnership mentioned in the foregoing Schedule, and the persons who subscribed to said Schedule, and who, being by me first duly sworn, each did declare the said Schedule B. to be a statement of all the partnership's estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

(SEAL) RICHARD H. GEOGHEGAN,
Notary Public in and for Alaska.
My commission expires 24 Aug. 1914.

(Then follows a summary of debts and assets taken from the Schedules A. and B., showing as debts: wages, $6773.00; unsecured claims, $7532.75; total

of liabilities, $14,305.75; and showing as assets: real estate, $1500.000; machinery, tools, etc., $1786.00; total of assets, $3286.00.)

Endorsed: "No. 49-B. In the District Court for the Territory of Alaska, Fourth Division. In the Matter of T. Mitchell & Co., Bankrupts. Schedules." "Filed in the District Court Territory of Alaska, 4th Div. Sep 26 1913, C. C. Page, Clerk, By P. R. Wagner, Deputy." "No. 2011. Pltfs Exhibit C., G. Johnson Trustee vs Am. Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska, 4th Div. Nov 1 1915 J. E. Clark, Clerk, By Sidney Stewart, Deputy.")

We now offer in evidence the adjudication that T. Mitchell & Co. are bankrupt.

(Defendant objects as no foundation has been laid;that there has been no service of subpoena; no evidence that a subpoena was ever issued; no evidence that these parties were ever brought before the Court; and no evidence that the Court ever acquired any jurisdiction to render an adjudication; for the further reason that it shows on the face of it that if that is treated as an adjudication at all, it is absolutely contrary to the provisions of section 18 of the Bankruptcy Law, which says that no adjudication shall take place until five days after the return day. There was no subpoena issued, and the only basis on which they have any return day—the law says it shall be returned within fifteen days; that under this order admitted in evidence the return day

was made in seven days. Section 18 of the Bankruptcy Law says not less than five days thereafter, if the defendants have not filed any appearance, and if the creditors have not filed an appearance or pleaded, that then the adjudication shall be made. This paper shows on its face that they did not wait five days; that this was done within three days after the seven days specified in the order for appearance, and which should have been covered by a subpoena, which it never was. The plaintiff has offered in evidence the alleged adjudication; we object further to its admission for the reason that it shows on the face of it that the copartnership of T. Mitchell & Co. were not adjudged bankrupt and have never been adjudged bankrupt.

Objection overruled.

Exc. 4.

Defendant excepts and is allowed an exception. Adjudication marked in evidence as "Plaintiff's Exhibt D", and is as follows:)

PLAINTIFF'S EXHIBIT 'D.'

In the District Court for the Territory of Alaska, Fourth Judicial Division.

In the Matter of T. Mitchell & Co., a Mining copartnership composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, Bankrupts.

No. 49-B.

In Bankruptcy.

At Fairbanks, in said Division, on the 30th day of

September, A. D. 1913, before the Honorable Fredric E. Fuller, judge of the said Court in bankruptcy, the petition of James G. McCann and others that Thomas Mitchell, James J. Fallon and Herman Fawcett, co-partners under the firm name of T. Mitchell & Co., be adjudged bankrupts, within the true intent and meaning of the acts of Congress relating to bankruptcy having been heard and duly considered the said Thomas Mitchell, James J. Fallon and Herman Fawcett, co-partners doing business under the firm name and style of "T. Mitchell & Co.", are hereby declared and adjudged bankrupt accordingly.

Done in open Court this the 30th day of September, A. D. 1913.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 12, page 697.

("Endorsed: "Orig. In Bankruptcy. No. 49-Bankruptcy. In the District Court for the Territory of Alaska, Fourth Division. In the Matter of T. Mitchell & Co., a Mining Copartnership composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, Bankrupts. Adjudication, R. F. Roth, Attorney for.... Fairbanks, Alaska." Filed in the District Court Territory of Alaska 4th Div. Sep 30 1913, C. C. Page, Clerk, by Angus McBride, Deputy." "No. 2011 Pltfs Exhibit D. G. Johnson, Trustee, Plaintiff vs. Am. Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska, 4th Div.

Nov 1 1915, J. E. Clark, Clerk, By Sidney Stewart, Deputy.")

I now offer in evidence the order of reference.

'(Defendant objects as irrelevant, incompetent, and immaterial, no foundation laid for the offer. On the further ground that the Court had no jurisdiction to make such order, and that the record shows on its face that the Court was without jurisdiction to make the order of reference, as he did not at that time have any jurisdiction over the person of the alleged bankrupts or over the property constituting the estate of said alleged bankrupts. Objection overruled, and said order admitted and marked "Plaintiff's Exhibit F", and is as follows:)

PLAINTIFF'S EXHIBIT 'F.'

In the District Court for the Territory of Alaska, Fourth Judicial Division.

In the Matter of T. Mitchell & Co., a mining copartnership composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, Bankrupts.

No. 49-B.

Order of Reference In Bankruptcy.

Whereas Thomas Mitchell, James J. Fallon and Herman Fawcett, copartners under the firm name and style of T. Mitchell & Co., of the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, on the 30th day of September, A. D. 1913, were duly adjudged bankrupts upon a petition filed in this Court against them on the 25 day of August, 1913,

according to the provisions of the Acts of Congress relating to bankruptcy; it is, therefore,

Ordered that said matter be referred to W. H. Adams, referee in bankruptcy of this Court to take such further proceedings therein as are required by said acts and that the said Thomas Mitchell, James J. Fallon and Herman Fawcett shall attend before said Referee on the 16th day of October, 1913, at Fairbanks, Alaska, and thence forth shall submit to such orders as may be made by said Referee or by this Court relating to said Bankruptcy.

Done in open Court this 30th day of September, A. D. 1913.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 12 page 697.

(Endorsed: "Copy. No. 49 Bankruptcy. In the District Court for the Territory of Alaska, Fourth Division. In the Matter of T. Mitchell & Co., a Mining Copartnership composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, Bankrupts. Order of Reference. R. F. Roth, Attorney for.... Fairbanks, Alaska." "Filed in the District Court Territory of Alaska, 4th Div. Sep 30, 1913, C. C. Page, Clerk, By Angus McBride, Deputy." "No. 2011 Pltfs Exhibit F., G. Johnson, Trustee, Plaintiff, vs. Amer Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska, 4th Div. Nov 1, 1915, J. E. Clark, Clerk, By Sidney Stewart, Deputy.")

Exc. 5.

(Defendant excepts and is allowed an exception.)

We offer the papers under one cover, entitled, "Bond of Trustee"; it includes a notice of acceptance of trustee, the appointment of trustee—there are two copies—the order of the referee fixing the bond, and the undertaking of the trustee.

(Defendant objects on the following grounds: Objects to the introduction of the notice of acceptance of the trustee upon the ground that W. H. Adams, the referee in bankruptcy was entirely without jurisdiction to appoint a trustee; there had been no valid reference to him as referee in bankruptcy, and there had been no valid adjudication; and that the referee was without authority to act. Objects to the introduction of the appointment of trustee, for the reason that it shows on the face thereof that it is an attempt to appoint a trustee in a matter not before the District Court or before the referee in bankruptcy, being in a separate and distinct proceeding from any proceeding heretofore referred to in this action, and in a proceeding not properly before the Court, over which the Court had no jurisdiction; objects to the introduction of the order fixing bond, for the reason that it was beyond the power of the referee to make such an order, that it is in the matter of a bankruptcy matter that is not before the Court and has never been before the Court, and in which there has been no adjudication. Objects to the bond or undertaking offered in evidence, for the reason that it is

an undertaking wherein G. F. Johnson, the plaintiff in this action, purports to give an undertaking to the United States that he will faithfully administer the estate of Thomas Mitchell, James J. Fallon, and Herman Fawcett, bankrupts, and that the proceedings and matters before this Court are in connection with the title to certain personal property alleged to belong to T. Mitchell & Co., a copartnership, and that there is no foundation laid for the introduction of this undertaking, and it does not appear to be an undertaking such as is required by the Bankruptcy Act, that must be given by a trustee of a bankrupt estate. That this purports to be an undertaking for the administration of the estate of individuals and not of the copartnership.

Objection overruled.

Exc. 6.

Defendant excepts, and an exception is allowed. Defendant moves the Court to strike from the files in this case that portion of the exhibit termed the "undertaking", on the ground that it is irrelevant, incompetent, and immaterial, and is not and does not purport to be an undertaking given in connection with the matter of T. Mitchell & Co., bankrupts.

Motion denied.

Exc. 7.

Defendant excepts and is allowed an exception. Papers offered, admitted, and marked as "Plaintiff's Exhibit G". Plaintiff, by Mr. Marquam, asks that the undertaking be marked "G-1.". So ordered by

the Court. The said papers are as follows:

PLAINTIFF'S EXHIBIT 'G.'

In the District Court of the United States, Fourth Division, Territory of Alaska.

In the Matter of T. Mitchell & Co., Bankrupts.

In Bankruptcy.

Notice of acceptance by trustee.

To W. H. Adams, referee in bankruptcy on said Court:

You are hereby notified that I do hereby accept the office of Trustee in the above entitled matter.

Dated: At Fairbanks, Alaska, October 16, 1913.

G. F. JOHNSON.

In the District Court of the United States, Fourth Division, Territory of Alaska.

In the Matter of T. Mitchell & Co., Bankrupts.

In Bankruptcy.

Appointment of Trustee by Referee.

At Fairbanks in said district on the 16th day of October, A. D. 1913, before W. H. Adams, referee in bankruptcy,

This being the day appointed by the Court for the first meeting of creditors under the said bankruptcy, and of which due notice has been given in the Fairbanks Daily Times, a newspaper of general circulation published in said district, I, the undersigned referee of the said Court in bankruptcy, sat at said time and place above mentioned, pursuant to such

notice, to take the proof of debts, and for the choosing of a trustee, under the said bankruptcy.

And I do hereby certify that the creditors whose claims had been allowed, and who were present duly represented, failed to make choice of trustee of said bankrupt estate,

And. therefore, I do hereby appoint G. F. Johnson, of the Fairbanks Precinct, Fourth Judicial Division, Teritory of Alaska, as trustee of the same; and the creditors being then and there present whose claims had been allowed, agreed that the bond of such trustee be fixed in the sum of One Thousand dollars, which said sum of One Thousand Dollars is hereby fixed as the bond to be given by such trustee herein.

W. H. ADAMS,
Referee in Bankruptcy.

In the United States District Court for the Territory of Alaska, Fourth Division.

In the Matter of T. Mitchell & Co., Bankrupts.

No.....

It appearing to the Court that G. F. Johnson of Fairbanks Precinct in said District has been duly appointed trustee of the estate of the above named bankrupt and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed by the Court and consented to by the creditors to-wit: in the sum of One Thousand Dollars, it is ordered that the said bond be, and the same is hereby approved.

Dated Fairbanks, Alaska, October 17, 1913

W. H. ADAMS,

Referee in Bankruptcy.

(Endorsements: See endorsements on Plaintiff's Exhibit 'G'.)

PLAINTIFF'S EXHIBIT 'G-1.'

In the District Court for the United States, Fourth Division Territory of Alaska.

In the Matter of T. Mitchell & Co., Bankrupts.

In Bankruptcy.

Undertaking.

(Bond of Trustee)

KNOW ALL MEN BY THESE PRESENTS: That we, G. F. Johnson, as principal, and Hugh McCrorie, of Fairbanks, Alaska, and Theo. Johnson of Fairbanks, Alaska, as sureties, are held and firmly bound to the United States of America in the sum of One Thousand Dollars in lawful money of the United States to be paid to said United States, for which payment well and truly to be made we bind ourselves and our heirs, executors and administrators, jointly and severally by these presents.

Signed and sealed this 16th day of October, A. D. 1913.

The condition of this obligation is such that,

Whereas, the above named G. F. Johnson was, on the 16th day of October A. D. 1913, appointed trustee in the case pending in bankruptcy in said Court wherein Thomas Mitchell, James J. Fallon and Herman Fawcett are the bankrupts, and, he, the said G.

F. Johnson has accepted said trust and all the duties and obligations pertaining thereto.

Now, therefore, if the said G. F. Johnson, trustee as aforsaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of the estate of said bankrupts which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as such trustee, then this obligation to be void; otherwise to remain in full force and virtue.

G. F. JOHNSON, Principal.
HUGH McCRORIE,
THEO. JOHNSON, Surety.

Signed and sealed in the presence of:
R. M. CRAWFORD,
E. T. WOLCOTT.

United States of America,
Territory of Alaska,—ss:

Hugh McCrorie and Theo Johnson the sureties named in the foregoing bond, being first duly sworn, each for himself deposes and says: That he is a resident of the Territory of Alaska. That he is not an attorney or counsellor at law, marshal, deputy marshall, clerk of any Court or other officer of any Court. That he is worth the sum of One Thousand ($1000) Dollars over and above all his debts and liabilities, exclusive of property exempt from execution.

HUGH McCRORIE,
THEO. JOHNSON.

Subscribed and sworn to before me this 16th day of October, 1913.

(SEAL) E. T. WOLCOTT,

A Notary Public for Territory of Alaska,

My commission will expire May 10, 1917.

(The originals of Plaintiff's Exhibit G and Plaintiff's Exhibt G-1 are filed under one cover, which is endorsed as follows: "No. 49-B. In the District Court for the Territory of Alaska, Fourth Division. Bankruptcy. In the Matter of T. Mitchell & Co. Bankrupts. Bond of Trustee. R. F. Roth Attorney for....Fairbanks, Alaska." "Filed in the District Court Territory of Alaska 4th Div. Oct 17 1913 Angus McBride Clerk By C. C. Page Deputy." "No. 2011 Pltfs Exhibit G., G. Johnson Trustee vs Amer Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska, 4th Div. Nov 1 1915 J. E. Clark Clerk By Sidney Stewart Deputy." "No. 2011 Pltfs Exhibit G-1 '(undertaking) G. Johnson Trustee Plaintiff vs Am Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska, 4th Div. Nov 1 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

JAMES J. FALLON, sworn as a witness for plaintiff, testified as follows:

Direct Examination, by Mr. Marquam.

A. My name is James J. Fallon. I am the James J. Fallon mentioned in the complaint in this action and one of the copartners of the firm of Mitchell & Co. Said firm consisted of Thomas Mitchell, Her-

man Fawcett, and myself; it was formed about the 18th of January 1913, for the purpose of mining on Ester Creek, on the Hoffman Bench. The copartnership had an 85 per cent lease on that ground. We proceeded to mine in practical mining as far as I could find out. We formed an agreement between ourselves, so there would be no friction and so we would work in harmony. I was to be on the surface, in the tail race, or anywhere it happened to be that I had time to fill in. I was looking after the clerical end of it and the commissary end, and I was up around the surface as much as possible. I kept the books. I had all dealings with the merchants.

Q. What were the assets of the partnership at the time of your commencing operations?

(Defendant objects as immaterial, not within the issues in the case. Objection overruled.

Exc. 8.

Defendant excepts and exception allowed.)

A. My partners, Mr. Fawcett and Mr. Mitchell, did not have much; they had their experience to put in and their labor to put up. I was working at the time and I furnished, to about the latter part of April, the money to keep the lease going financially. That is from the 18th of January to about the middle of April. That was during the period when we were opening up. Then we had to pump water there and it cost quite a bit of money, and thereafter I had to get assistance, which the bank loaned me. During that time, all the financial assistance that the com-

pany had came from myself; the other members had nothing but their experience as miners. They were willing to do right, as a partnership should.

Q. What were the assets,—not yours individually, but belonging to the copartnership,—at the time you commenced mining operations out there? That is the three individuals as a firm, not as individuals?

A. I had about fifteen hundred dollars myself. That is all that was my individual money. I put that into the copartnership and used that money up. That was part of the copartnership assets, that or what it purchased. The copartnership owned nothing, except some mining property that I had; it did not belong to the copartnership then. The partnership owned the lease on the Hoffman bench. The partnership had no other assets, to my knowledge. They did not put anything into the enterprise. At the time the partnership was formed, my other two partners didn't have any money; I was the only one that had a little money to keep the thing going, which I did until the end of April; that was the reason I put up the money. At the time of the formation of the partnership in January 1913 I individually owned a piece of mining property .

Q. What was this property that you had at that time?

(Defendants object as immaterial. Objection overruled.

Exc. 9.

Exception taken and allowed.)

A. I had a side claim, No. Seven above on Fairbanks Creek, right limit, the Fallon Bench. I had another piece, the Owl association, a half interest in her, and Four above on the right limit of Little Eldorado. That was my personal assets. I retained that property up until the time of this bankruptcy proceeding.

Q. What became of it then?

(Defendants object as immaterial. Objection overruled.

Exc. 10.

Exception taken and allowed.)

A. That was put in the schedule.

Q. What was the value of that property on the 31st day of July, 1913, that you have just described?

(Defendant objects as witness has testified to personal property belonging to himself as an individual and not to the copartnership. The question of the solvency or insolvency of the individual members of the copartnership is not before the Court at the present time, there being no contention that the individuals have ever been adjudged bankrupt.

Objection overruled.

Exc. 11.

Defendant excepts and is allowed an exception.)

A. Well, I guess it is worth the same as it was down on the assets; a thousand for Fairbanks Creek, and five hundred for Little Eldorado.

Q. Is that all the property you had?

A. Yes sir, all.

Q. What property had your copartners at that time of the formation of the copartnership?

A. Nothing.

Q. What property had they outside of the copartnership property on the 31st day of July 1913?

A. Nothing, to my knowledge.

Q. When did you commence actual mining operations in the way of extracting gold in large quantities from the ground out of this lease or lay?

A. About the 9th of June 1913.

Q. Prior to that time what debts had you incurred, Mr. Fallon?

(Defendants objects as immaterial. Overruled.

Exc. 12.

Defendant excepts and exception is allowed.)

A. Well, probably.... (interrupted)

Mr. Clark: We object that it is not the best evidence if he has the books.

A. About fifteen hundred dollars.

The Court: What date was that?

Mr. Marquam: At the time they commenced the excavation of dirt and removal of it to the surface.

Q. About what date was that?

A. That was the 9th of June. That was the money that the copartnership owed me; the money that I had advanced for them. The Company owed the American Bank of Alaska at that time about $400.00.

Q. You think that is about all the company owed at that time?

A. You talked about bills. I got machinery and one thing and another like that, and the firm owed about $2000.00 for that on or about the 9th of June; that was for machinery, grub, and outfit; there was some little wages to be paid, too. We had the first clean-up on the third of July, it amounted to $1904.00.

Q. What did you do with the money?

A. The money was turned into the American Bank.

Q. You had been doing business with the American Bank before that?

Yes sir.

Q. And had an account there?

A. Yes sir.

Q. After you turned it in what was done with it?

A. It was credited to us and I drew out checks for everybody,—made out checks and they were honored as far as—in fact, further than the money that was there to cover it, which made an overdraft.

Mr. Pratt: What was the exact amount?

A. Which?

Q. Of the first cleanup?

A. $1904; that is exclusive of royalty.

Mr. Marquam: What date was that brought into the bank?

A. It was brought in on the 3rd of July—the night of the 2nd of July.

Q. Do you know how your account stood at the American Bank when you brought your first clean-

up in?

A. We owed them about $1400.00.

Q. Was their account taken out of the proceeds of the gold dust that you brought in at that time?

A. No; the checks were all honored.

Q. The checks for what?

A. For wages, and for merchandise too; any checks that were wrote out by me for the firm were honored.

Q. So your account at the bank, after the first cleanup had been disposed of, stood just the same as it had before?

(Defendant objects as leading and suggestive.

Overruled.

Exc. 13.

Exception taken and allowed.

A. I beg pardon?

Q. I understood the effect of your testimony to be that after the disposition of the first cleanup or the proceeds thereof, your account at the bank stood the same as before the cleanup was brought in?

A. Yes, exactly.

Q. Without being reduced any?

A. No.

Q. You didn't reduce it at all?

A. No; I did'nt reduce it all; I couldn't reduce it, because Mr. Hurley advanced me some more money to carry along on.

Q. Did the money that they advanced, or the checks that you issued, cover—clear up all your in-

debtedness that you were owing at that time?

A. No, sir, the money that was brought in didn't cover the checks.

Q. When did you have the second cleanup?

A. On the 16th of July.

Q. How much did you clean up at that time?

A. Twenty-two hundred and eighty dollars, exclusive of royalty.

Q. What did you do with that cleanup?

A. Brought it in and put it in the bank.

Q. What did the bank do with the gold or the proceeds thereof?

A. Well, I told Mr. Hurley—(interrupted)

Q. Never mind what you told them. What did they do?

A. It was put to our credit just the same and carried along.

Q. After it was put to your credit, what did you do with it, if anything?

A. I didn't do anything. The checks were honored.

Q. You checked against it?

A. I checked against it.

Q. And the checks were honored?

A. Yes sir.

Q. When did you have the third cleanup?

A. Supposed to have it on the 26th, but we didn't have it until the 30th.

Q. Just explain why that was Mr. Fallon.

A. Well, the water was low. We had to return

the water. The water was very muddy and it was a very dry season and everyone was up against it. And we ought to have cleaned up every ten days—that was the intention of my partner Mr. Mitchell. The 26th came along and he said: "We better wait until we get a bigger cleanup."

(Defendant objects. Objection sustained.)

Q. Don't repeat what Mitchell told you, just what was done. What was done?

A. It was postponed until the 30th.

Q. During the time between the 26th and the 30th, did the bank people, or any of its officers, make any inquiry of you as to what was going on out there?

A. Naturally they called over the 'phone.

Q. Did they do it?

A. Yes.

Q. Who called you up?

A. Mr. Bruning called me up once and wanted to know when the cleanups were coming in.

Q. What did you tell him?

A. I told him my partner postponed it until the 28th and we expected a pretty good cleanup; that he expected it would be eight thousand dollars and would cover everything.

Q. Did he ask you concerning the expected cleanup, what you thought it would amount to?

A. Yes.

Q. What did he say in that particular?

A. If I ain't mistaken, I think, to the best of my remembrance, I think that was the time he told me,

he said: "You have no money, Jim, and these notes, the overdraft here, and I have deposited something to meet your checks." That that was that five hundred dollars that he deposited to meet the checks.

Q. To reduce the overdraft?

A. To reduce the overdraft.

Q. What did he say over the 'phone with regard to inquiring whether you expected a good cleanup or otherwise? Did he make that inquiry.?

A. He said: "I hope you do have a good cleanup." I think that was over the 'phone.

Q. Did you tell him what you expected to have?

A. Yes, I told him what we expected to have.

Q. What did you tell him that time over the 'phone?

A. I told him we expected to have eight thousand dollars, according to my partner; that was the reason he postponed it until the 28th.

Q. You told Mr. Bruning that you expected a cleanup on the 28th, but you postponed it until the 30th?

A. Postponed it to the 30th.

Q. Did he make any more inquiries after that until the 30th?

A. No.

Q. What was said by Mr. Bruning, if anything, about the bank cashing the next checks before the cleanup?

A. There was only one check he didn't cash, and that was, I think, about—that was the morning of

the 31st.

Q. What was the amount of that check?

A. Aleck McLean had a four hundred dollar check and he went in—(interrupted)

Q. And it was not cashed?

A. It was not cashed.

Q. You think that was on the 31st?

A. I think that was—It was on the 30th.

Q. So you cleaned up on the 30th of July?

A. Yes sir.

Q. How much did you clean up?

A. Well, $3750.14, exclusive of royalty.

Q. And what did you do with the cleanup?

A. Brought it in to the bank.

Q. When?

A. The night of the 31st.

Q. About what time in the night?

A. It was between 5 and 6 o'clock.

Q. Between 5 and 6 o'clock on the 31st day of July 1913?

A. Yes sir.

Q. Now at that time what did you owe the bank in notes?

A. At that time we owed them $1504.00.

Q. Represented by notes?

A. The notes were $850.00 and the overdraft of $133.00, and $500.00 on deposit to reduce the overdraft, making it $1504.00.

Q. I am talking about the 31st of July when you brought in your last cleanup.

A. Yes sir; we still owed the bank then.

Q. How much was your indebtedness to the bank on notes alone at that time?

A. On notes alone?

Q. About, if you don't know the exact figure?

A. About—over a thousand dollars; about one thousand and fifty dollars, exclusive of—(interrupted)

Q. How much did you say you owed them on overdraft?

A. $133.00 was the overdraft.

Q. How much was your total indebtedness to the bank at that time?

A. $1504.00.

Q. Wasn't your indebtedness something over $4000.00 to the bank?

A. Oh, the total indebtedness?

Q. That is what I am asking you about; I said: notes and overdraft.

A. Yes, it was $4800.00.

Q. Have you got any data there from which you can refresh your memory and give the exact amount?

A. I think I have. (Produces papers and book.) $4878.82 from the 16th of July to the 31st of July. For labor they paid $3071.50 in labor checks, and for bills, merchandise, and one thing and another, $1804.-32. That is from the 16th of July to the 31st of July. And we owed the bank a balance of $4096.04 on notes and overdraft. That was the total indebtedness of the firm to the American Bank on the 31st of July 1913. The indebtedness for labor on that date was $6773.00.

Q. I will ask you, at that time, after the 31st day of July 1913, were you still an employer of labor? Did you contract any labor debts after that time?

A. None whatever. As shown by our schedule we owed other accounts, merchandise, etc, amounting to $7532.75, exclusive of labor bills.

Now, with regard to your assets at that time, the assets of the firm of T. Mitchell & Co., your schedule shows: personal property—(interrupted)

(Defendant objects as immaterial; that if they are going to stand on the adjudication, they are bound by the adjudication. Plaintiff's attorney, Mr. Marquam, states that the adjudication that was made was that the firm was insolvent on the 25th of August 1913, and attention is now directed to a time 20 days earlier, at the time of the transaction with the bank.

Objection overruled.

Exc. 14.

Defendant excepts. Exception allowed.)

A. We had, as shown by the schedules, property in the way of mining outfit amounting to $1786; that is the machinery and so forth on the claim on the 31st of July 1913; the assets and liabilities, as shown by the schedule, was the condition of the firm on the 31st day of July 1913. The firm had no other assets at that time.

Q. I may ask: Prior to taking this gold dust to the bank.

A. What debts we had?

Q. No, what assets, what property, did you have?

Did you have this gold dust prior to its disposition?

A. Yes, we had that gold.

Q. Very near $3800.00?

A. I thought you meant mining property. We still had the lease at that time; it was not forfeited then. The firm had no other assets on the 31st of July 1913.

Q. What was the condition of the assets or the property of the individual members of that copartnership? Had they increased any? Had yours increased any from the time you described a while ago when you commenced mining operations and told what property you had.

(Defendant objects as irrelevant, incompetent, and immaterial. Objection overruled.

Exc. 15.

Defendant excepts. Exception allowed.)

A. I didn't make anything.

Q. Had the condition of the other members so far as property was concerned changed any during that time?

A. No.

Q. Tell the jury, when you brought that gold dust into town just what you did with it.

A. I took it into the bank. Mr. Hopkins was at the left hand side of the bank; Mr. Hopkins was tending me. Bruning was close by. I waited a second or two, and Fawcett went into the bank with me,—my partner. I left it there. We hadn't had an opportunity to blow it that day on account of a poor

fellow getting killed, and the coroner's jury was there and we didn't have a chance to blow it, so we brought it in at the gross weight. I waited to see it weighed up, and it corresponded with our weight out there, and I left it there to be blown and credited the same as before. So I left it there thinking they would attend to it later on, as soon as they got a chance. They were all busy. And a little while after that I went there—I think that was probably near eight o'clock, between seven and eight o'clock—to see if it was cleaned up yet, and it was not, and I said: 'I will call in the morning'. I went in in the morning, and—(interrupted)

Q. What time?

A. It was about twenty minutes past nine. Mr. Bruning told me—I asked for my book, etc., and I said: 'Mr. Bruning, good morning.' He said: 'Jim, I am sorry to tell you that it has been my instructions to get all the overdrafts in, and I have applied it and disbursed it'—(interrupted)

Q. Applied what?

A. The money.

Q. What money?

A. That money, I suppose. He gave me the book and the vouchers, and he said he couldn't carry me any longer.

Q. Was he referring to this money or the gold dust that you had taken in there the evening before?

A. The gold dust.

Q. Did you leave your bank book when you took

the gold dust in there?

A. I certainly did.

Q. Did he return it to you?

A. No, not that morning. Now I remember it was the next morning, the second. After he told me that, I said: 'Mr. Bruning, good gracious, I have made checks out for the men. Are you not going to try and carry us a little while longer?' He said: 'I have got to get all the overdrafts in. It is my instructions, I have got to carry them off.' Of course the notes were on demand, etc. And I said: 'Well, we are up against it then; we can't check against that dust.' Then I got the book the next morning.

Q. On the 2nd?

A. On the morning of the 2nd, the vouchers and all he returned to me.

Q. What did Mr. Bruning say to you in reponse to your statement 'Then we can't check against it'? What did he say?

A. Well, he told me that he couldn't go any further, and I asked him twice if he couldn't strain a point and go with us and carry us along a little longer, and he said he couldn't do it.

Q. He corroborated your statement to him that the result of the bank's action was that you couldn't check against it? Did he corroborate that?

A. Yes, I couldn't check against it.

Q. What time did the bank open that morning for business?

A. I couldn't say, because I immediately left there.

Q. What time does the American Bank usually open for business in the morning?

A. Ten o'clock, I suppose.

Q. Was the bank open for business at that time?

A. No.

Q. How were the blinds, up or down?

A. The blinds were up.

Q. And the door was open?

A. The door was open.

Q. And the clerks were in there?

A. Yes.

The Court: What time was that?

A. About 20 minutes past 9.

Q. What date?

A. On the morning of the 1st of August.

Mr. Marquam: About the blinds, how do you say they were?

A. They were closed, you know, the same as when they are out of business for the day.

Q. Drawn up from the bottom?

A. Yes.

Q. Or from the top down?

A. Whichever way they go.

Q. After you placed this gold dust in the American Bank did you ever check against it or withdraw any of it?

A. No. sir, I couldn't get it.

Q. You were not permitted to?

A. I couldn't get to check against it.

Q. Do you know what the condition of your accounts were so far as outstanding checks were concerned at that time that had been issued by you?

(Defendant objects as immaterial. Objection overruled.

Exc. 16.

Defendant excepts. Exception allowed.)

A. I couldn't say exactly.

Q. Was there ever any check of yours cashed, either by yourself or by any of those to whom you had issued checks, after this gold dust had been placed in the bank on the evening of July 31st?

A. No, I can tell you the amount of wages that is due.

Q. I don't care about that. I am asking you directly: Was any check cashed by the bank after you had deposited this money upon the 31st of July, 1913?

A. No, sir.

Q. Either by yourself or by anybody to whom you had issued checks?

A. None whatever, except the bank vouchers.

Q. To whom had you issued checks before this last cleanup?

(Defendant objects as witness stated that he didn't know he had any checks standing out. Mr. Marquam denies that the witness so stated. Objection overruled.

Exc. 17.

Defendant excepts. Exception allowed.)

A. What is it?

Q. To whom had you issued checks prior to this third cleanup and the time that you brought that into the bank?

A. Well, labor and merchandise.

Q. Can you give us an idea of about how many checks or the amount of the checks that you had issued between your second cleanup and your third cleanup?

(Defendant objects as immaterial. Objection overruled.

Exc. 18.

Defendant excepts. Exception allowed.)

A. There was $3071.00 labor checks and $1800—(interrupted)).

Q. Were those outstanding at the time you brought this last cleanup in to the bank?

A. No, sir, they were paid between the 16th and 31st.

Q. Do you know how many were not paid; that were still outstanding?

A. No, I couldn't tell you that.

Q. Do you remember whether there was a considerable amount, or otherwise?

(Defendant objects. Objection overruled.

Exc. 19.

Defendant excepts. Exception allowed.)

A. There must have been. From the 16th all the checks that were issued up to the second cleanup were honored, but after the second cleanup there was

six thousand dollars— Well, yes, there was about four thousand dollars' worth of checks that were not honored.

Q. That were not paid?

A. Yes.

Q. That couldn't be. If you can give us an idea from your data as to how many checks were outstanding that were not paid by the bank, why, give it to us.

(Defendant excepts as immaterial. Overruled.

Exc. 20.

Defendant excepts and exception allowed.))

Q. I think you misunderstood the question. I want to know how many checks that you had issued in behalf of Mitchell & Co. were outstanding, that hadn't been paid by the bank on the 31st day of July, 1913; can you give us some idea as to that?

A. About $2594.00.

Q. Do you understand the question?

A. I am just looking. I think I have that data of the total wages due. That is what you mean.

Q. It may be.

A. I presume you could tell by that. I can go by the check book.

Q. I am asking you this question: At the date of July 31st had you issued checks to all your men?

A. Yes, sir.

Q. Every man that you owed money to had a check?

A. They all had checks.

Q. And those were outstanding, checks against

the American Bank?

A. Exactly.

Q. Whatever the amount then of your indebtedness to your labor was upon the 31st day of July, that amount of checks were outstanding?

A. Deducting $3071.00 from the total and it would leave about $8000.00, I think.

Q. About how much?

A. $3000, I mean.

Q. Do you mean to say that on the 31st day of July, 1913, there were outstanding checks to the amount of three thousand dollars?

A. I have to go through that check book and count them up.

Q. If you don't know, I don't. The total wages due you have on the assets there. Pay attention to what I am asking you and not let your mind be directed to something else. I asked you if you had issued checks to all the men you employed out there and to whom you owed money.

A. Yes, I had.

Q. And all the money that you owed as bankrupts when you went through bankruptcy you owed on the 31st day of July, 1913?

A. Yes sir.

Q. So, whatever is shown on your schedule that you owed to labor those checks were outstanding and unpaid, were they not on the 31st of July, 1913?

A. Exactly. Yes. Well, it is in the schedule—

$8000.00

Q. $7000.00, is it not?

A. Or $6000.00.

Q. That is the correct amount?

A. Yes, sir.

Q. And those checks were outstanding?

A. Those checks were outstanding?

Q. Do you know what became of those checks?

A. I couldn't say. The men have got them I suppose, most of them. They all got checks.

Q. Who did you first have dealings with, Mr. Fallon, so far as the bank was concerned,—what officer?

A. Mr. Hurley.

Q. What was the extent of your dealings with Mr. Hurley? I mean—

(Interrupted.)

(Defendant objects as immaterial. Mr. Marquam states he wants to show who in the bank had knowledge of the facts in the matter. Objection overruled.

Exc. 21.

Defendant excepts. Exception allowed.

A. I made several little borrows of him for the company. Mr. Hurley went to Iditarod, and after he went I had dealings with Mr. Bruning. I have known him ever since I have been in the camp, since 1904; I think I was here before Mr. Bruning came. When I came in from Ester Creek I only went in the bank on business.

Q. Were the affairs of the copartnership and

your venture out there discussed at all with Mr. Bruning?

A. No, not especially, any more than to say: 'Well, how is she going?' Of course, the second cleanup I brought in, the mine was beginning to show up a little better, and we had bright hopes for the next cleanup, that it would be considerable better and that we would be able to wipe out the obligations.

Q. As between your partners, I understood you to say a while ago that you were the member of the firm that transacted all the business with the bank?

A. Yes, sir, I was.

Q. State what Mr. Bruning said to you when the cleanup came in which amounted to thirty-seven hundred odd dollars, after your conversation with him over the 'phone that you expected to have a cleanup of $8000.00.

A. I didn't talk with Bruning that night at all. He was busy. I just simply handed the dust to Mr. Hopkins, who said he would attend to it immediately he got a chance to blow it. And when I went back then, Mr. Bruning was there at the time, and he said: "We are not quite ready yet, Jim." I said: "Let her go until the morning." So I went home.

Q. What did he say to you in the morning?

A. In the morning he told me, he said he was certain he could not carry us any longer. He said: "Jim, we had to meet all those notes, and I am instructed to take in all the overdrafts."

Q. What did he say, if anything, about you not having a better cleanup?

A. He said it was a poor cleanup; that was all.

Q. When did he tell you that,; the night of the 31st of July or the morning of the 1st of August?

A. The morning of the first.

Q. You did, as a matter of fact, did you not, know the amount of the gold dust, and the bank knew it, on the evening of the 31st?

A. I had the gross, you know, the same as it tallied when Paul weighed it up.

Q. You didn't know what the net was?

A. No, we didn't have a chance to blow it out there. Mr. Bruning said—

(Interrupted.)

The Court: The question is answered.

Mr. Marquam: On the 31st of July, 1913, or at any other time, did Mr. Bruning or any member of the bank make inquiry of you in regard to your financial standing or the financial standing of the firm or its individual members, that you did not answer?

(Defendant objects as immaterial. Objection overruled.

Exc. 22.

Defendant excepts. Exception allowed.

A. No, sir, they never inquired of me.

Mr. Marquam: You may cross-examine.

Cross-examination.

By Mr. Clark: You had a fixed valuation that they paid you at the bank for the gold dust, did you

A. No, sir.

Q. You understand something about bookkeeping, don't you?

A. A little.

Q. You know that if, upon the date that last cleanup came in and was deposited in the bank, your account was on the red so many hundred dollars or so many thousand dollars, that this cleanup would be put on the other side and it would automatically balance itself, wouldn't it?

A. I couldn't say anything about that; I am not in the banking business.

Q. If you owed them at that time say $2500.00 on the 31st of the month, and you should bring in something over $3000.00 and deposit it, it would leave to your credit $500.00. You understand that the debits are entered on one side and the credits on the other?

A. Exactly.

Q. And the difference between them is between your credit balance and your debit balance?

A. Yes.

Q. Now, these notes—may I see the notes?

A. Certainly. (Hands same to Mr. Clark.)

Q. There was another note, wasn't there?

A. That is all I have got.

Q. Mr. Bruning had deposited some money to your credit?

A. Yes, he deposited it to carry us along; $500.00.

Q. Mr. Bruning had helped you along individually by depositing $500.00.

A. He had; we couldn't do any more with the bank, but he had helped us individually.

Q. He put in his own note to the bank to cover that overdraft?

A. Yes.

Q. And to be taken out of the money when you brought in a cleanup? That was understood?

A. There was no agreement at all; I never asked him to do that, so far as that goes.

Mr. Clark: We ask to introduce in evidence the bank book.

(There being no objection, the bank book is admitted in evidence, and marked "Defendant's Exhibit 1." The entries therein are as follows:

DEFENDANT'S EXHIBIT '1.'

Dr. American Bank of Alaska in acc't with Mitchell & Co. Dr.

1913				1913		
June	11	Deposit	400.	July 16	1913 Checks as per List 51 Vouchers Ret'd	3353.65
	19	"	100.			
July	3	135.81 at 16.50	1904.75			
	7	Deposit	165.19			
	8	"	850.			
		Overdraft	133.71			
			3353.65			3353.65
		16.50		Jul	16 1913 Overdraft	133.71
July	18	85 per cent of 158.70 oz.	2213.14		Aug 2 67 Cks per list	6329.70
July	19	Dep. by A. Bruning to reduce overdraft	500.			
	31	85 per cent 267.87 at 16.47	3750.27			
			6463.41			6463.41

(Endorsed: "No. 2011. Deft's Exhibit 1. G. Johnson Trustee Plaintiff. vs Am Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska 4th Div Nov 1 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

Q. When you came in on the 31st, you expected to go back and go to work?

A. I certainly did.

Q. You had the ground blocked out?

A. Yes, everything was in working shape.

Q. And you had your crew there?

A. The crew were there.

Q. And you were going back and continue mining within a day or two?

A. Exactly.

Q. Was there any work actually going on while you were in town?

A. I immediately sent word out to my partner when Mr. Bruning told me that I couldn't—(interrupted.)

Q. Was there any work going on while you were absent?

A. Yes,there was.

Q. They were continuing to work?

A. Yes.

Q. The ground looked fairly good at that time?

A. It did.

Q. A pretty good paystreak and considerable water mixed up with it?

A. Well, the ground was looking better.

Q. It was getting better as you went along?

A. That is what I understood from my partners there.

Q. During the month you called up once or twice and told Mr. Bruning that you had drawn checks,

and asked him to honor them?

the cleanup, that we expected $8000.00—that my part-

A. I think I called him up once and told him about ners expected that.

Q. And you asked him if he would not honor the checks until the cleanup got in?

A. Yes.

Q. And he said he would honor the checks until the cleanup got in?

A. He said that was all right.

Q. And then he told you also that he had put his note in there?

A. He did.

Q. And it was understood, of course, that that would be paid when the cleanup came in?

A. Naturally I supposed it would, but there was no direct understanding to that effect—never any words to make any agreement like that.

Q. That was your understanding, however, between you?

A. Naturally a man expects to get his own.

Q. Didn't you tell Mr. Bruning on the evening of the 31st or on the morning of the 1st that your ground was looking very good out there and you were going ahead?

A. In fact, yes, I did.

Q. And you had good expectations at that time?

A. Not the morning of the 31st.

Q. No. On the morning of the 1st, when you went in the next morning?

A. Oh, no; in fact, I didn't say anything. After he gave me the vouchers that was enough for me. I said: "Good gracious, can't I check against this, Mr. Bruning?" It just paralyzed me, and I didn't stay in there; I went away.

Q. You didn't tell him you had checks outstanding?

A. No.

Q. He didn't know that; he simply told you that he couldn't carry you longer?

A. He knew that. I said: "The checks are made out for the men; I made them out before I came in."

Q. After the cleanup, or before you came in, you made the men's checks out.?

A. I made the men's checks out the night before.

Q. After you had had your cleanup?

A. No, sir, before the cleanup; never dreaming but what they would be recognized and cashed.

Q. One of those checks was presented to the bank before you got in here?

A. There was one, as I told you,—McLean.

Q. He was a wood man?

A. He was teaming. And Mr. Bruning told him —(interrupted.)

Q. Never mind what he told him; that is heresay. You never told Mr. Bruning at any time that things were not looking well out there, did you?

A. No, sir, I did not.

Q. He was always friendly when you came into

the bank; he asked you how things were going and you expressed yourself?

A. Naturally so.

Q. And when you came in this time with the cleanup, you say you didn't talk with him at all the next morning, and that conversation you have related is practically all of the conversation you had there?

A. Why,that is all. I was taken aback because the men couldn't get their wages, and he said he had done the best he possibly could with us in carrying us along, but he had to take in his overdrafts.

Q. You recognized that he had done the very best he could?

A. I certainly did.

Q. He had even put up a note of his own for $500.00 to carry you through to the cleanup?

A. Yes, and I thought he would probably carry us along a little while again, because we all fully expected to get into better ground.

Q. And you still believed that if you had continued you would have gotten into better ground?

A. I believe we would, myself, for a fact.

Mr. Clark: That is all.

Redirect Examination.

By Mr. Marquam: Mr. Fallon, you made one statement in answer to Mr. Clark's questions: That the bank, for this last cleanup, that paid you at the rate of $16.40?

A. According to the book.

Q. That is just according to their own figures in the book?

A. Yes.

Q. Then as a matter of fact you were not paid anything except as they set it off against your account?

A. Yes.

Mr. Clark: That is calling for his conclusion. It shows that they were credited the same as they always were in that book.

The Court: I understood it to be $16.47 an ounce.

Mr. Marquam: Mr. Clark used that particular word: "You were paid sixteen dollars and forty cents for this last cleanup."

Mr. Clark: I don't mean paid in cash; he was credited with that much in the book.

Mr. Marquam: That is all you mean by that answer?

A. That is all.

Q. What, if anything, did you say to Mr. Bruning, when you came in with this last cleanup, either that night or the next day, about things looking better out there?

(Defendant objects as not redirect examination. Objection overruled.

Exc. 23.

Defendant excepts. Exception allowed.)

A. I told Mr. Bruning when he passed me the vouchers, the first thing I told him, I said: "Mr. Bruning, I am very sorry that you have come to that

conclusion that you can't carry us any longer and honor these checks that I have made out for the men, as the ground is looking a little better, and I have no doubt that we will probably be able to get through, be able to square up everything." I told him that.

Q. What did he say to that?

A. He said he couldn't go any further for the present; he couldn't do it. He said they couldn't carry us any longer.

Q. When this conversation occurred with you and Mr. Bruning, is that the time you told him that these checks were outstanding?

A. I told him that the men's checks were all issued to them; that is what I told him.

Q. Of what men?

A. For wages.

Q. For partial payment or full payment?

A. Up to date.

Q. Mr. Bruning, as a result of that conversation, knew that there were outstanding checks against his bank drawn by yourself for all the money that was owed by you to your workmen?

(Defendant objects as immaterial. Objection overruled.

Exc. 24.

Defendant excepts. Exception allowed.

A. Exactly.

Q. Was there any intimation to Mr. Bruning on your part as to the amount of these checks that were

outstanding?

A. No, sir.

Q. A simple statement to him that checks for the full amount of these wages were outstanding?

A. For the full amount of the wages; yes.

Mr. Marquam: That is all.

Mr. Clark: That is all.

JOHN KNOX BROWN, sworn as a witness for plaintiff, testified as follows:

Direct Examination.

By Mr. Marquam:

A. My name is John K. Brown; I am the United States commissioner for the Fairbanks precinct, and as such have custody of the records of the commissioner. I have here the docket of the civil cases, called the "Civil Docket."

Q. Do you find docketed in that book a case entitled Rutherford against T. Mitchell & Co.?

A. I find a case of Roy Rutherford and S. Widman— (interrupted).

Q. Against T. Mitchell & Co.?

A. Yes; as copartners. James Fallon, Thomas Mitchell, and Herman Fawcett, mining copartners under the firm name of Mitchell & Co. The book shows that the action was commenced on July 31st, 1913.

Mr. Marquam: We offer in evidence the docket entries with reference to the case of Rutherford and Widman against T. Mitchell & Co.

Mr. Clark: We object, beyond the mere recital that

the complaint was filed and the writ of attachment was issued. We think, beyond that, that it is not the best evidence in regard to any service, or anything of that kind.

(Objection overruled.

Exc. 25.

Defendant excepts. Exception allowed.)

Mr. Clark: That is, we object to all except that particular part.

The Court: Yes. It may be admitted and marked Plaintiff's Exhibit H.

Mr. Marquam: We do not want to mark this book.

Witness: It is on page 66 of the last Civil Docket, the current civil docket.

Mr. Marquam: That is all, Mr. Brown.

Mr. Clark: No cross-examination.

MATTHEW O. CARLSON, sworn as a witness for the plaintiff, testifies as follows:

Direct Examination.

By Mr. Marquam:

A. I am a deputy United States marshal and was such on the 31st of July, 1913. I have in my possession records or returns of garnishment proceedings in the case of Rutherford and Widman against the copartnership of T. Mitchell & Co.

Q. How is it that those papers are still in your possession, or in the possession of the marshal?

A. It was through an oversight in not getting them onto the original writ.

Q. Where have those papers been all this time?

A. In the files in our office in that case.

Q. In the marshal's office?

A. Yes, sir.

Q. What is the paper you have?

A. Return of the marshal and the answer of the garnishee.

Q. What garnishee?

A. The American Bank of Alaska.

Q. Those are the original papers in the possession of your office at the present time?

A. Yes, sir.

Q. And were not attached to the original writ when it was returned, through an oversight?

A. Yes, sir.

Mr. Marquam: We offer these papers in evidence.

(Defendant objects as irrelevant, incompetent, and immaterial, not tending to prove or disprove any of the issues in this case, and not the best evidence, and that this return seems to be but hearsay, by a person not sworn as a witness. Mr. Marquam states that the return is made by Deputy Fife. Mr. Clark, for defendant, states that he objects for the reason that it is not attached to the original writ of attachment, is not a part of an official record, and therefore is not pertinent, is not prima facia evidence of what it contains; that it is merely a paper found by Mr. Carlson in the files of their office, and is therefore subject to be proven the same as any other instrument; that it is not attached to any other instrument, or any part of an official record. Mr. Clark states

1	Up-right Engine, 6 H. P.
2	Circular Saws, 28"
38ft	Belting 4".
150ft	Iron Pipe more or less.
400ft	Iron Pipe more or less.
1500 ft	Steel Cables more or less
1	Iron Dump Bucket
1	Trolley Carriage
92	Mining Timbers
9	Cords Wood more or less
8	Cords Wood more or less
1	Gin Pole
1	Boiler House
1	American Hoist
1	Boiler No. 1034—50 H. P. Albion Works.
1	Boiler Scotch Marine 50 H. P.
1	Blacksmith Bellows.
1	Drill Press
20	Picks
1	Anvil
1	Grind Stone
2	Hammers
18	Steel Drills more or less
150 lbs	Blacksmith Coal
2bx	Candles
7 lbs	Cup Grease
3 gal	Red Oil
½gal	Lubricating Oil
1	Pipe Vise
1	Bench Vise

1 Feed Pump
1 1½ in. Pump
1 2 in. Pump
1 Centrifugal Pump
1 Centrifugal Pump Engine
1 1 in. Pump
Staging for Bin, Dump, and Sluice Boxes.
1 Set Dies, Pipe
1 Set dies, Blacksmith
75 ft ¾ in. rope
75 ft 1 in. rope
1 Mess House

Contents of Mess House

1 pr Stilliards
1 pr Fairbanks Scales
½ kit Salmon Bellies
½ kit Mackerel
¾ cs Eggs
1 cs Cream
cs Potatoes
45 lbs Butter
20 lbs Lard
5 lbs Onions
¼ drum Cheese
3 bot Catsup
1 gal Molasses
1 can Sausage Meat
2 can Roast Beef
1 pound tea
1 box Curry Powder

1 bot Horse Radish
3 cans Tomatoes
3 cans Cayenne Pepper, ¼ lb
1 can Ginger ¼ lb
1 can Sage ¼ lb
7 cans Sweet Potatoes
1 pc Bacon about 6 lbs
5 bars Laundry Soap
5 lbs Raisins
3 lbs Vermicelli
½ gal Syrup
35 lbs Cereals
2 cans Carrots
7 lbs Macaroni
5 lbs Y. A. Cheese
6 jars Jam
1 5-lb tin Jelly
1 5-lb tin Mince Meat
5 only lamps
150 lbs Flour hard
20 lbs Coffee
27 cans Lobster
33 cans Salmon
3½ lbs Cocoa
6 lbs Currents
1¼ lb Hops
2 lbs Baking Soda
10 lbs Tapioca
10 lbs Corn Meal
7 lbs Macaroni

3 pkg Corn Starch
2 bot Curry Powder
1 bot L. & P. Sauce
½ lb Cream of Tartar
25 lbs Dried Apples
1 cs Plums
15 cans Oysters 2 lb
8 can clams 2 lb
40 lbs White Beans
20 lbs Lima Beans
10 cans String Beans
19 cans Corn
15 lbs Pow'd Sugar, Aprox
3 gal Maple Syrup Aprox
11 cans Cabbage
I gal Apricots
8 cans Shrimp

And all other Personal property on said claim.

On Aug. 2nd, 1913 under instructions from Louis K. Pratt & Son, the Plaintiff's attorneys I released the following property: One boiler; one hoist; one bellows; one anvil; one bucket; one 1 in Worthington pump; one 1½ in. pump; one 2 in. pump; one centrifugal pump; and engine to run same; one 1 in. pump.

And I placed in charge Geo. A. Palmer as custodian in charge of said property.

Marshal's fee	$4.00
22 mi at 15c	3.30
	$7.30

L. T. ERWIN,
United States Marshal
By J. H. MILLER,
Deputy.

(Endorsed: "No. 2011 Pltfs Exhibit I G. Johnson Trustee Plaintiff vs. Am. Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska 4th Div Nov 1 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

PLAINTIFF'S EXHIBIT 'J.'

In the Commissioner's Court for the Territory of Alaska, Fairbanks, Precinct, Fourth Division.

Roy Rutherford and S. Widman, co-partners doing business under the firm name of the Independent Lumber Company, Plaintiffs,

vs.

James Fallon, Thomas Mitchell and Herman Fawcett, mining co-partners under the firm name of Mitchell & Company, or Fallon, Mitchell & Company, Defendants.

No....

Answer of Garnishee.

To the United States Marshal, Fourth Division, Territory of Alaska.

In reply to your notice of garnishment served in the above entitled action, we beg to report that we have no gold dust or other personal property or money in our possession belonging to the defendants above named or either of them nor have we any

credits due to them or either of them.

AMERICAN BANK OF ALASKA,
By A. BRUNING, Cashier.

Dated at Fairbanks, Alaska this 1st day of August, 1913.

(Endorsed: "No. 2011. Pltfs Exhibit J. G. Johnson Trustee Plaintiff vs. Am Bk of Alaska Defendant." Filed in the District Court Territory of Alaska 4th Div. Nov. 1 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

Mr Marquam: That is all.

Mr. Clark: No cross-examination.

JOHN K. BROWN, a witness for plaintiff, recalled, testified as follows:

Direct Examination, By Mr. Marquam.

A. I have in my possession all the papers in the case of Rutherford and Widman against Mitchell & Co., which were filed in the Commissioner's office. The complaint is here. (Hands same to Mr. Marquam).

Mr. Marquam: We offer the complaint in evidence.

'(Defendant objects as immaterial, and not tending to prove or disprove any issue in the case. Objection overruled.

Exc. 27.

Defendant excepts. Exception allowed. Complaint marked "Plaintiff's Exhibit K", and is as follows:)

PLAINTIFF'S EXHIBIT 'K.'

In the Commissioner's Court for the Fairbanks Precinct, Fourth Division, Territory of Alaska.

Roy Rutherford and S. Widman, co-partners doing business under the firm name of the Independent Lumber Company, Plaintiffs,

vs.

James Fallon, Thomas Mitchell and Herman Fawcett mining copartners under the firm name of Mitchell & Company or Fallon, Mitchell & Company, Defendants.

No.....

Complaint.

Comes now the above named plaintiffs and for cause of action against defendants allege:

1. That for all times herein mentioned Roy Rutherford and S. Widman have been and now are co-partners doing business under the firm name of the Independent Lumber Company, in the Fairbanks Precinct, Alaska.

2. That for all times herein mentioned, the above named defendants have been and now are a mining copartnership doing a mining business under the firm name of Mitchell & Company or Fallon, Mitchell & Company, on the Hoffman Bench on Ester Creek, Fairbanks Precinct, Alaska.

3. That between June 4th 1913 and June 12 1913, plaintiffs sold and delivered to defendants, at their special instance and request, lumber of the market value of $467.46, which price defendants agreed to

pay. Plaintiffs also shipped said lumber on or about said last date and paid freight on said lumber and an additional amount of freight in the sum of $18.25 and defendants have paid only the sum of $75.00 and no more, thereon.

4. That on or about the 10th day of July plaintiffs and defendants agreed that there was due and owing plaintiffs from defendants for the matters above set forth, the sum of $410.80 which defendants promised to pay.

Wherefore plaintiffs pray judgment in their favor and against defendants in the sum of $410.80 and for the costs and disbursements of this action and a reasonable attorneys fee.

LOUIS K. PRATT & SON,
Attorneys for Plaintiffs.

United States of America,
Territory of Alaska,—ss:

Roy Rutherford being first duly sworn on oath says: I am one of the plaintiffs in the above entitled action; have read the foregoing complaint and the allegations therein contained are true as I verily believe.

ROY RUTHERFORD,

Subscribed and sworn to before me this 31st day of July 1913.

HARRY E. PRATT,
Notary Public in and for Alaska.
My commission expires June 24th 1916.

(Endorsed: "897 In the Commissioner's Court for the Fairbanks Precinct, 4th Division, Territory of Alaska. Roy Rutherford et al. vs. James Fallon et al. Complaint. Filed July 31, 1913. John F. Dillon, Commissioner & Ex Officio Justice of the Peace. Louis K. Pratt & Son Attorneys for Plaintiffs. Ent. p. 66.")

(Endorsed: "No. 2011 Pltfs Exhibit K. G. Johnson Trustee vs. Amer Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska 4th Div. Nov 2 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

Mr. Marquam: Now we offer the writ of attachment in this case. The papers introduced yesterday should be attached to this, but by mistake were not.

Defendant objects as immaterial, not tending to prove or disprove any issue in this case. Objection overruled.

Exc. 28.

Defendant Excepts. Exception allowed. Writ of attachment marked as "Plaintiff's Exhibit L", and is as follows:

PLAINTIFF'S EXHIBIT 'L.'

In the Commissioner's Court for Fairbanks Precinct, Fourth Division, Territory of Alaska.

Roy Rutherford and S. Widman, copartners doing business under the firm name of the Independent Lumber Company, Plaintiff

vs.

James Fallon, Thomas Mitchell and Herman Fawcett mining copartners under the firm name of Mitchell & Co. or Fallon, Mitchell & Co. Defendants.

No. 897.

Writ of Attachment.

The President of the United States of America, to the Marshal of the Territory of Alaska, Fourth Division, or to his Deputy, Greeting:

Whereas, plaintiffs above named hath complained that defendants above named are justly indebted to them to the amount of Four hundred ten and 80-100 Dollars and ....cents and the necessary affidavit and undertaking herein having been filed as required by law.

We therefore command you, That you attach and safely keep all the personal property of the said defendants not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, as above stated, to be found in your Division of said Territory, and as shall be of value sufficient to satisfy the said debt and the costs and disbursements of the said paintiff herein. And of this writ make due service and return.

Given under my hand and official seal this 31st day of July 1913.

(SEAL) JOHN F. DILLON,

Commissioner and ex officio Justice of the Peace.

(Endorsed: "4th Div. Dist. of Alaska Received

Jul 31 1913 Office of U. S. Marshal Fairbanks, Alaska. Marshal's Docket No. 125. Writ docketed July 31 1913. Return docketed Aug 12 1913." "Orig. No. 897. In the Commissioner's Court Territory of Alaska, Fourth Division, Fairbanks Precinct. Roy Rutherford et al Plaintiff vs. James Fallon et al Defendant Writ of Attachment Returned and filed this 12 day of Aug 1913.....Commissioner and ex officio Justice of the Peace. Ent. p. 66." "No. 2011 Pltfs Exhibit L. G. Johnson Trustee Plaintiff vs. Am. Bk. of Alaska Defendant." "Filed in the District Court Territory of Alaska 4th Div. Nov. 2 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

Mr. Marquam: That is all.

Mr. Clark: No cross-examination.

HERMAN FAWCETT, sworn as a witness for plaintiff, testified as follows:

Direct Examination, By Mr. Marquam:

A. My name is Herman Fawcett, I am one of the copartners of the firm of T. Mitchell & Co., mentioned in this case, and was such on the 31st day of July 1913, which was the date of the last cleanup that we had. The cleanup was held during the day and in the evening I was in town. I came in about 5 o'clock. I had occasion to go to the American Bank that evening, somewhere near 6 o'clock. I came in from the claim on the 5 o'clock train, with James Fallon, who had the cleanup. I went to the bank with him when he delivered it.

Q. What was done when you took the gold into the bank?

A. Mr. Fallon just passed it through the window.

Q. What time was that ?

A. Between five and six.

Q. How long did you remain there?

A. Only a few minutes.

Q. When did you go back there again the first time after that?

A. Probably 15 minutes after that.

Q. State to the jury what you went back to the bank for on this second occasion, about 15 minutes after you delivered the gold dust?

A. I heard that there was to be an attachment served against the gold dust, and I went in to find out whether anything could be done.

Q. Who did you understand was levying an attachment?

A. Jack Nelson.

(Defendant objects as hearsay. Objection Overruled.

Exc. 29.

Defendant Excepts. Exception allowed.)

Q. The firm was indebted to Jack Nelson at that time in what sum?

A. In the neighborhood of $1000.00.

Q. When you went back to the bank who did you see?

A. Mr. Bruning.

Q. What coversation occurred between you and Mr. Bruning at that time?

A. I asked Mr. Bruning if the dust could be attached.

Q. What did he say?

A. He said: No, that it could not; it had been applied to overdrafts and checks that had been left there for collection.

Q. That was at what time?

A. Somewhere round 6 o'clock.

Mr. Marquam: You may cross-examine.

Mr. Clark: No cross-examination.

TONY LIONGAVICH, sworn as a witness for plaintiff, testified as follows:

Direct Examination, By Mr. Marquam:

A. My name is Tony Liongavich. I am a miner and worked during the summer on the Hoffman Bench for Mitchell & Co. I came to town about the 1st of August, at the same time these gentlemen brought in the last cleanup,—I came on the same train, on the 31st of July.

Q. What was your purpose in coming to town?

(Defendant objects as immaterial. Objection overruled.

Exc. 30.

Defendant excepts. Exception allowed.)

A. I came in to town to cash in my check.

Q. How much of a check did you have?

A. $148.50 I believe.

Q. Did you cash your check?

A. I went to the bank on the morning of the 1st of August.

Q. Did you cash your check?

A. No sir.

Q. When did you go to the bank?

A. On the 1st of August in the morning.

Q. What time in the morning of the 1st of August?

A. I believe about 10 o'clock; I was waiting for the bank to open.

Q. Did you go into the bank to cash your check as soon as it was open?

A. I went into the bank right after—as soon as it was open. Yes.

Q. What was the result?

A. Well, sir, when I went in they refused to cash it. They told me the gold dust was attached. That was all.

Q. Who told you that?

A. Mr. Bruning.

Mr. Marquam: That is all.

Mr. Clark: When did you receive that check?

A. On the 31st.

Q. At Ester?

A. Yes.

Mr. Clark: That is all.

HARRY E. PRATT, sworn as a witness for plaintiff, testified as follows:

Direct Examination, By Mr. Marquam:

A. I am an attorney at this bar and was attorney

for Mr. Rutherford in the case of Rutherford against Mitchell & Co., commenced in the commissioner's court sometime in 1913. I attended to all the legal matters connected with that case.

Q. The records of the commissioner's office show in that case that an attachment was issued and that the American Bank was garnisheed?

Mr. Brown: The records in the commissioner's office don't show that.

Mr. Marquam: It should be there. It is on record in the marshal's office; the return of the marshal shows that he garnisheed the American Bank.

Q. Did you have a conversation with the officers of the American Bank on the 31st day of July 1913 relative to this garnishment?

A. I did.

Q. What time of day or evening, if you know, was this garnishment served?

A. It was served along about 8:30 or 9 o'clock in the evening.

Q. Of what day?

A. Of the 31st of July 1913.

Q. When did the conversation that you had with the bank officials occur with reference to that time?

A. Well, it occurred just after the garnishment had been served—a short time after.

Q. What was the conversation that you had and with whom?

A. I called up the American Bank and got either Mr. Bruning or Mr. Rettig,—I couldn't say which

one, but it was one of the two,—and I asked them what we caught in the garnishment in Rutherford against Mitchell & Co., and he answered that we didn't catch anything, and I said: "How about that cleanup that came in this afternoon?" "Well, he said, "they were away in the red to us, and we just credited that cleanup, and they are still away in the red."

Q. Was that the extent of the conversation?

A. Yes, that was all.

Q. Who was Mr. Rettig that you refer to in your testimony?

A. He was the assistant cashier over at the bank.

Q. And Mr. Bruning was the cashier?

A. Was the cashier, yes.

Q. It was one of those two, but you don't know which one?

A. No, I don't remember which one.

Mr. Marquam: Cross-examine.

Cross-Examination, By Mr. Clark:

Q. Mr. Pratt, when they said they were away in the red, you understood that to mean that the account was overdrawn, and the overdraft was represented by red ink in the bank books. That is what you understood?

A. I understood that they were away in debt to them. That is what I understood by "in the red."

Q. You understand that when they say a man is "in the red" that that means that he has not any balance, but that he owes them?

A: Yes, that he is in debt to them.

Q. That he had overdrawn his account?

A. Yes.

Mr. Clark: That is all.

Mr. Marquam: That is all.

JAMES J. FALLON, a witness for plaintiff, recalled, testified as follows:

Direct Examination, By Mr. Marquam:

Mr. Fallon, during the month of July, while you were carrying on operations out there, what was the average number of men employed?

(Defendant objects as immaterial. Objection overruled.

Exc. 31.

Defendant excepts. Exception allowed.)

A. About 50 men—50 to 55.

Mr. Marquam: Cross-examine.

Mr. Clark: No cross-examination.

MATTHEW O. CARLSON, a witness for plaintiff, recalled, testified as follows:

Direct Examination, By Mr. Marquam:

I will ask you if you are familiar with the signature of W. W. Fife, who was a deputy—(interrupted)

A. I am.

Q. I will ask you if that paper, which you examined yesterday and testified about, and which is marked "Plaintiff's Exhibit I", bears the signature of Mr. Fife?

A. It does.

Q. He was a deputy marshal at that time in your

office?

A. He was.

Mr. Marquam: That is all.

Mr. Clark: No questions.

Mr. Marquam: That is our case.

Plaintiff Rests. Jury Retires.

Mr. Clark: At this time we ask the Court,—move the Court,—to direct a verdict,—to direct the jury now trying this case to bring in a verdict in favor of the defendant in this case, on the grounds: First. An absolute failure of proof of the essential elements required by the Bankruptcy Law to be proven before this case could be decided in favor of the plaintiff, or before they can prove a prima facia case; Second. On the ground that it clearly and conclusively appears from the evidence introduced in this case that there was no preference; that the defendant in this case, at the time of the deposit of the gold dust in question on the 31st day of July 1913, did not have reasonable cause to believe, or any cause to believe, (a) that the firm of Mitchell & Co. were insolvent, or (b) that by applying this account to wipe out the overdraft and the overdue notes, a preference could thereby be effected; Third. On the further ground that the defendant in this action had, as a matter of right under the law,—under the Bankruptcy Law, and under the general law,—the right to credit the proceeds of the sale of that gold dust to the deposit account of Mitchell & Co, and had a right to set off against said deposit all overdue in-

debtedness then held and owned by the bank due and owing from the firm of Mitchell & Co.

Mr. Pratt: Will you permit me for a moment? This motion comes out of time. The motion for a nonsuit comes at the end of all the evidence, and it can not be entertained at this time.

Mr. Clark: We are asking that, if the Court does not grant us a directed verdict, then we move the Court for a nonsuit on the grounds we have heretofore set forth as grounds for our directed verdict.

(Motions Denied.

Exc. 32.

Defendant excepts. Exception allowed.)

A. BRUNING, a witness sworn for defendant, testifies as follows:

Direct Examination, By Mr. Clark:

A. My name is A. Bruning. I am cashier of the American Bank of Alaska, the defendant in this case, and was such cashier on the 31st day of July 1913. I am acquainted with Mr. J. J. Fallon. I may know Mr Fawcett, but I am not very much acquainted with him.

Q. Do you remember the incident of Mr Fallon bringing some gold dust to the bank on the afternoon of the 31st day of July 1913?

A. I remember him bringing some gold dust in, yes sir.

Q. Do you remember, Mr Bruning, the bank purchased that gold dust from Mr Fallon at that time?

A. The bank made a purchase of that gold dust—(interrupted)

(Plaintiff objects and asks that the witness state what happened and the Court directs that witness answer the question by "yes" or "no.")

Q. Do you remember whether or not you purchased the gold dust.

A. Yes sir.

Q. What did you do? As the question now stands, you say you remember whether you purchased it. Did you purchase it?

(Plaintiff objects as leading and asks that witness state what happened. Objection overruled.)

A. We bought the gold dust and placed the proceeds to the credit of Mitchell & Co.

Q. Why did you place it to the credit of T. Mitchell & Co?

A. Mr. Fallon was a member of the firm of T. Mitchell & Co., and they had an account with the bank for a month or two.

Q. Have you any independent recollection of just the exact amount of gold dust that you purchased from Mr. Fallon at that time?

A. There is a slip there.

Q. I show you this instrument. (Hands paper to witness.) and ask you what that is, if it is an official record of the bank?

A. It is a teller's gold dust slip.

Q. What is the precedure when gold dust is brought into a bank? Where it is purchased by the

bank to whom does it first go?

A. To the gold dust teller.

Q. Who was your gold dust teller at that time?

A. Mr Hopkins.

Q. Then, after it goes to the gold dust teller, what does he do?

A. He examines the poke and looks at the gold dust, and flips it, as we call it, to see how clean the gold dust is. If it shows any great amount of dirt or black sand he proceeds to clean it. As I remember this particular lot of dust it was very dirty, probably 10 or 15 per cent. of the total original weight consisted of black sand and other dirt, and therefore the teller has got to clean it. That might have taken half an hour; I don't remember how long it did take.

Q. After he gets it cleaned, what does he do toward ascertaining the amount thereof?

A. After cleaning, he weighs the gold dust, and figures out the amount of ounces at a certain rate at which gold dust is valued at from certain claims. It varies on different creeks. In this instance, he paid for this gold dust at the rate of $16.40 per ounce.

Q. How many ounces of gold dust as represented by that slip were the property of T. Mitchell & Co.?

A. 220.69 oz.

Q. What was the total value in cash?

A. $3734.12.

Q. What was done with the proceeds of the purchase of that gold dust?

A. After Mr Hopkins made out this slip, I presume he turned it over to me, and I made out a deposit slip whereby I placed it to the credit of Mitchell & Co.

Q. Is that the deposit slip (indicating a paper).

A. That is the original deposit slip, yes sir.

Q. What date does that bear?

A. July 31st.

Q. What amount of money is represented by that deposit slip?

A. $3734.12.

Q. To whose credit was it placed?

A. Mitchell & Co.

Q. In whose handwriting is that slip?

A. This is my writing.

Q. Is that the correct date on there?

A. That is the date that the gold dust was bought.

Q. On what date was it placed to the credit of T. Mitchell & Co., if you know?

A. Well, now, I don't remember.

Q. If I show you the bank book, could you then tell?

A. Presumably the same date.

Q. I will show you this bank book which has been introduced in evidence and marked "Defendant's Exhibit 1", and ask you if, by examining that, you can tell what date it was placed to their credit?

A. On July 31st.

Q. What kind of an account did they have, a special or a general account?

A. A general checking account.

Q. What account was that particular item placed to; to the credit of what particular account was that item placed?

A. To the credit of Mitchell & Co.

Q. To their general account?

A. To their general checking account.

Q. Is this one of your original bank records?

A. That is an original bank record, yes sir.

Q. Would you have any objection to having it placed in evidence here?

A. I want it back or a certified copy.

Mr Clark: We offer it in evidence and ask that it be marked as "Defendant's Exhibit 2".

(Paper so marked, and attorneys for respective parties agree that it may be withdrawn and returned to the defendant bank at the conclusion of this trial, the Court having admitted it in evidence.)

We also offer in evidence, subject to the same agreement that we may withdraw it at the conclusion of the trial, this slip which Mr Bruning testified concerning, being the original gold dust teller's slip.

(There being no objection, the same is admitted in evidence and marked "Defendant's Exhibit 3".)

Mr Clark: I desire to read into the record the principal part of Defendant's Exhibit 2.'(Reads:)

"Deposited in American Bank of Alaska, Fairbanks, Alaska, July 31, 1914," Under the head of 'checks',—"85 per cent. 267.87 oz. Advanced 16.40 $3734.12".

I desire to read into the record Defendant's Exhibit 3. (Reads:)

"Gold dust purchased No. 4309. American Bank of Alaska, Iditarod Alaska. 7-31-1913. Adv. 267.87. M. & Co. 227.69 3734.12. Hoffman 40.18 659 at 16.40 per oz. Pay to the order of Mitchell & Co. 4393.12. Hop.".

Q. How does it happen that this bears the word "Iditarod"?

A. That is some stationery that was returned from Iditarod when we closed up there, and we were using it up.

Q. The American Bank had a branch at Iditarod?

A. Yes.

Q. And you were simply using some of the stationery?

A. Yes.

Q. Mr Bruning, at the time this gold dust was brought into the bank, do you remember who brought it in?

A. I think it was Mr Fallon.

Q. Do you remember of having any conversation with him when it was first brought in?

A. Well, now, I don't remember of talking to him at the time there.

Q. Did you have any, later in the day?

A. That same afternoon I talked with him; yes.

Q. Do you remember what time he first came into the bank?

A. Shortly after—I think he came in on the eve-

ning train. What time I don't know—4:30 or 5 o'clock; or he came in on the auto; I don't remember how he came in.

Q. Do you say you remember having a conversation with him that afternoon?

A. After the gold dust was delivered and Mr Hopkins was cleaning it I believe yet, I (interrupted)

Q. Just state what the conversation was.

(Plaintiff objects as irrelevant, incompetent, and immaterial. Objection overruled.)

A. What was the question?

Q. What was the conversation you had with Mr Fallon that afternoon?

A. I don't know, as I had any particular conversation with Mr Fallon, unless—I told Mr Fallon that, after this gold dust was weighed, and the credit made of it, that I would charge up what notes we had in the bank, past due, against the account. As near as I remember, that is the only conversation I had with Mr Fallon.

Q. Was that actually done on that afternoon?

A. It was done the same afternoon; yes sir.

Q. When did you next see Mr Fallon, if you remember?

A. He may have been in again in the evening, or the next day, I don't remember.

Q. Where items of credit or debit come into the bank after banking hours, how are they handled so far as the individual ledger is concerned?

A. After 3 o'clock the individual ledger closes for

the day. Any business that comes in after 3 o'clock will not go on the individual ledger until the following day.

Q. The items that you give here, that are shown in this bank book of Mitchell and Company, a credit to their account of the proceeds of the gold dust on the afternoon of the 31st, under what date would that appear in the individual ledger?

A. On August 1st, if that was not a holiday.

Q. Would it appear on the next business day?

A. On the next day's business.

Q. Who was your bookkeeper at that time?

A. Mr Harry McLean.

Q. Do you remember, or can you, by examining that bank book, tell, when that book was balanced up, Mr. Bruning?

A. The last entry here shows July 31st, a credit. Now, 67 checks returned. It is here June or July 2nd. I don't know if that could be possible.

Q. Isn't that August?

A. It might have been August 2nd, but the sheet in the individual ledger will show the date that the book was balanced. It may possibly have been ballanced on the evening of the 31st, in the afternoon, or not until next morning. I don't remember. I don't know anything about that.

Q. Was the account of Mitchell & Co., so far as the debits and credits are concerned, balanced on the 31st?

(Plaintiff objects as leading.)

Q. When were the accounts of Mitchell—(interrupted).

A. I don't know; the individual ledger will show, I guess.

(Plaintiff asks that the answer be stricken. Motion denied, as the answer seems to show that he has a book that will show.

Q. When the credit was made in their general bank book, what paper or instrument was made out at that time for the instruction of the bookkeeper relative to the entry?

A. The bookkeeper gets the deposit slip the next day.

Q. When that deposit slip was made out, so far as the physical act—or what would you say in regard to the physical act of crediting the account—was concerned? Had it not been consumated, that is, credited in the bank book account?

A. After the deposit slip had reached the bookkeeper. The transaction between the bank and the individual depositor had been transacted in the afternoon of the 31st.

Q. I show you this sheet and ask you what it is? (Exhibits a sheet to witness.)

A. That is the account of Mitchell & Co. with the bank.

Q. From what ledger is that taken?

A. The individual ledger.

Q. From an examination of that, when were the actual entries made by the bookkeeper carrying into

the individual ledger the credit given, as you say, on the 31st day of July?

A. On August 1st he made the entry here, a credit of $3734.12.

Q. When were the overdue notes charged against that account?

A. According to this they were charged the same date, on August 1st, by the bookkeeper.

Q. What kind of a record would you make out to instruct him to make those entries?

A. It doesn't require any instructions. The tabs or checks are handed over to him, and the deposits are handed over to him, and it is his business to put them in the ledger. That is what he is paid for.

Q. But I am referring to the notes that the bank held at that time?

A. The notes are treated the same as a check would be. In some instances we treat the note the same way as a check; in other instances we make out a debit slip showing the amount of the note as well as the interest due up to date and charge it against the man's account, whoever it is against.

Q. What notes, if any, were charged against the account of Mitchell & Co., as shown by your records?

A. There was an $850.00 note, a $500.00 note, and part payment applied on another note.

Q. Had that other note ever been surrendered to them?

A. No sir.

Q. Have you the note still in your possession?

A. We have.

Q. How much of a credit was made on that?

A. I think it was $135.00 and some odd cents.

Q. Would it show there, that credit?

A. No, that wouldn't show here; it would show in this $1485.00 amount, I guess.

Q. That $1485 was the sum total of the $850.00 note, and the $500.00 note, and the other credit?

A. Yes.

Q. When was the book balanced?

A. On August 2nd.

Q. Would that be the time it was handed back to Mr. Mitchell? (Means Fallon.)

A. I suppose so.

Q. Or to Mr Fallon, I meant.

Q. Mr. Bruning, did you, on the 31st day of July 1913, have any knowledge or information, of any nature or description, that would lead you to believe, or to think, that Mitchell & Co. were insolvent?

A. I did not.

Q. Did you, at the time of the charge against the account of Mitchell & Co. of those promissory notes, have any reason to believe, or any knowledge that would lead you to believe, that Mitchell & Co. would not pay their other creditors, and that the money you had received would be a preference?

A. I did not.

Q. Had you believed them insolvent or in danger of insolvency would you have permitted an overdraft in the bank?

(Plaintiff objects as mere speculation; let him state what he did, and not what he would have done. Objection overruled.)

A. I would not.

Mr. Pratt: When was that?

Mr Clark: I direct your attention to the 31st day of July 1913, and at all times between the 16th day of July and the 31st day of July, would you, if you had believed during any of that period that they were insolvent or in danger of insolvency, have permitted them any overdraft in the bank?

(Mr Pratt, for plaintiff, objects as immaterial. The Court rules that the witness may answer the question as to any of the dates mentioned, except the 31st.)

Q. Between the 16th and the 31st—I will ask another question. Mr Bruning, as cashier of the American Bank of Alaska, if you had any information or knowledge at any time between the 16th of July 1913 and the 31st of July 1913 that Mitchell & Co. were insolvent or in danger of insolvency, would you have permitted them to have an overdraft at that bank?

(Plaintiff objects as irrelevant, incompetent and immaterial. Objection overruled.)

A. I would not.

Q. Did you have any conversation with Mr Fallon over the 'phone at any time between the second cleanup and the third cleanup on this Hoffman Bench where they were working?

A. I think I had one or two conversations with

him.

Q. Do you know what the conversations were about?

A. Well, either he rang up or I rang up, I don't remember which. They began to issue checks, and I didn't want to pay them, not knowing how things were out on the claim, and Mr Fallon assured me that everything looked well, that the boxes looked good.

(Plaintiff objects as irrelevant, incompetent, and immaterial. Objection overruled.)

Q. Finish your answer. Was there anything further?

A. Nothing further.

Q. Anything said about his overdraft, or anything of that kind?

A. Upon the assurance that he stated, that the boxes looked good, I went to work and told him that I would take care of a reasonable amount of checks.

Q. Would those checks constitute an overdraft?

A. All the time.

Q. What, if anything, was said about when overdrafts would be taken care of?

A. At the first cleanup, it was understood.

Q. Did he mean the first subsequent cleanup?

A. The first cleanup they made.

Q. What about these notes that were in the bank, Mr Bruning? What was to be done with them?

A. Originally the notes, when they borrowed the

money the notes were supposed to have been paid at the first cleanup. They were not taken care of at the first cleanup, because they felt that labor and other bills, the laborers and other people wanted money, and they wanted the bank to kindly wait until the next cleanup. So we did wait until the next cleanup. Still they felt that the bank might wait. I told him my instructions were, when Mr Hurley went away, that I should charge up those notes. So, when the third cleanup came in, I charged up the notes, as I was instructed to by Mr Hurley.

Q. What is your rule about overdrafts?

Mr Pratt: You say you charged up the notes the first cleanup? (No answer)

A. We don't like to have overdrafts.

Mr Clark: In dealing with men who are conducting mining operations, does the bank occasionally permit overdrafts from one cleanup to another?

A. Frequently.

Q. Had you received any information on or about the 31st—I withdraw that. When was the garnishment in the case of Rutherford and Widman against Mitchell & Co. served upon the bank, Mr Bruning?

A. My recollection is that it was in the evening of the 31st, at 8 or 9 o'clock in the evening.

Q. Where were you when the papers were served on you?

A. I think I was sitting in the front of the bank there. That was when the bank was over here. (Indicating.)

Q. When the bank was in this store in this building right across the street from the courthouse?

A. Yes, that is my recollection.

Q. Was your day's work completed at the time you were sitting there?

A. Yes.

Q. Had these entries that you speak of having been made in the books here, in the bank book crediting him up, and the charges against the account,—had they been completed at the time this garnishment was served on you?

A. The books were all locked up.

Q. Had the deposit slip for their account been made out at that time?

A. All finished for the day.

Q. Had the notes been charged against the account and set off against the account before the attachment was levied?

A. The notes and the debits had been made against the account.

Q. Was the account closed, so far as the bank was concerned, at that time?

A. It was.

Q. All that remained to be done was the physical entries in the individual ledger by the bookkeepes?

A. On the following day; yes.

Q. Did you have any idea, Mr. Bruning, that Mitchell & Co. were going to discontinue mining?

(Plaintiff objects as irrelevant, incompetent, and immaterial. Objection overruled.)

A. I did not.

Q. Did you at any time on the 31st day of July believe, or have any reason to believe, or have any information that would lead you to believe, that if these notes were charged against their account that you have spoken of that they would be unable to pay the balance of their creditors, if they had any?

A. No.

Q. You knew from the statements that they had made that they had opened up a piece of mining ground on Ester Creek?

A. I guess they were in about ten thousand dollars opening it up; it is generally considered an asset.

Mr Pratt: You are referring to their lease?

A. No, the physical opening up of a mine.

Mr Clark: Was this account of Mitchell & Co. treated any different from the way you treat other accounts with mine operators in this district, Mr Bruning?

(Plaintiff objects as irrelevant, incompetent, and immaterial. Objection overruled.)

A. No.

Q. Did you have any reason to treat it differently, or consider it any different from the ordinary miner's account?

A. No.

Mr Clark: Take the witness.

Cross-Examination, By Mr Pratt:

A. I have lived in Fairbanks since 1906 and have been in the banking business part of the time; part of

the time I was in the stage business. I have been cashier of the American Bank of Alaska since May 1910, I guess. Before that I was connected with the First National Bank for about a year and a half here in town, and out on Cleary for two seasons with the Bank of Cleary. In 1906 for a short time I was on Cleary—the winter of 1906 and 7 until May, I guess, 1908, I was with the First National, then I went back to Cleary. I was in the banking business at Cleary. For the last five years I have been cashier of the American Bank of Alaska.

Q. Well, now, that has given you an extensive experience in the relations of banks and mining operators?

A. Some would consider it so; yes.

Q. Since you have been with the American Bank of Alaska you have been its cashier, and at least when Mr Hurley wasn't in town you have been its general manager, haven't you?

A. Yes sir.

Q. When the firm of T. Mitchell & Co. commenced doing a banking business with the American Bank of Alaska in 1913, what ones of them were you acquainted with?

A. Well, I knew Mr Fallon. I don't know if I would know Mitchell if he was in the room.

Q. How is that?

A. I don't think I would remember Mitchell if he was present in the room, Mr. Fallon was the man I

knew.

Q. Did you know Fawcett?

A. No.

Q. Practically, Fallon was the only one of the firm that you knew?

A. I think he was the first one of the firm that came around to the bank to do business and opened up the account.

Q. How long had you known Fallon?

A. I think I met him here in 1905.

Q. And you have known him ever since?

A. Yes sir.

Q. He worked down at the Northern, didn't he, as bartender?

A. When I knew him first he was in the Totatlanika, mining.

Q. I ask you: while you knew him here in Fairbanks if he was not working there?

A. At one time he was working at the Northern.

Q. He was working down there in 1913 before he commenced mining?

A. I suppose so; I don't know.

Q. You knew he was working there as a bartender at and before the time he commenced mining operations out there on Ester, didn't you?

A. Yes, he had worked. He was bartender at the Northern for several years, I guess.

Q. You knew he didn't have any property to amount to anything, didn't you?

A. Well, I wasn't acquainted with his financial

condition; he always earned good wages, didn't he?

Q. When he came to the bank about banking operations with you, did you inquire of him as to what property he had?

(Defendant objects as not cross-examination. Objection overruled.

Exc. 33.

Defendant excepts. Exception allowed.)

A. Mr Hurley was here at the time the original loan was made to Mr Fallon; it was not me.

Q. That don't answer my question. You said a while ago that Mr. Fallon was the man that came there and made arrangements about doing banking business, didn't you?

A. Yes sir. The record will show that Mr Fallon was there. Yes.

Q. Did you inquire of him?

A. I did not; Mr Hurley may have.

Q. You don't know whether he did or not?

A. I wasn't present.

Q. Fallon borrowed some money right on the start, didn't he?

A. He did.

Q. Did you know what he was going to use that money for?

A. He put it to the credit of Mitchell & Co.

Q. You knew at that time that Mitchell & Co., a firm composed of T. Mitchell, J. J. Fallon, and Herman Fawcett, were going into a mining venture out there on the Hoffman Bench, didn't you?

A. I don't know.

Q. Didn't you know that?

A. I didn't know who was in with him. All I know is that Mr Fallon made that deposit to Mitchell & Co. If Mitchell and Fallon and Fawcett were interested in a proposition—(interrupted)

Q. Didn't you know that Mitchell & Co. were going into a mining venture on Ester Creek?

A. They were mining then, I believe.

Q. Didn't you know that? Didn't they tell you so?

A. Mr Hurley made the arrangements.

Q. Didn't you know it from some source; that Mitchell & Co. were going into a mining venture, were going to do mining on the Hoffman Bench on Ester Creek?

A. It showed that Mitchell & Company were working ground on Ester creek.

Q. You knew that all the time, didn't you?

A. Yes.

Q. And you knew that the first thing that happened, Fallon came there and borrowed money, didn't you?

(Defendant objects as irrelevant, incompetent, and immaterial. The Court states that the matter has already been testified to, but allows the question to be answered.)

A. One of the notes that was charged up was probably Fallon's note, but I don't remember. I don't think it was this Fallon note here.

Q. You dont?

A. No.

Q. Fallon gave several notes there, either signed by himself or by some member of the firm there with him.

A. They gave one note there for $850.00.

Q. That was given 'way along in July, wasn't it?

A. I don't remember.

Q. I am talking about some small notes that Fallon came there and gave you at different times, borrowing small sums of money, that were afterward taken up and put into that $850.00 note.

A. No sir.

Q. Isn't that true?

A. No sir.

Q. Who did give those notes for the $850.00?

A. It was Mitchell & Co. by Fallon.

Q. How many of those were there?

A. That $850.00 note.

Q. How much were these small notes that made up that amount?

Defendant objects for the reason that the witness did not testify that there were any small notes.)

A. There was one note for $850.00, signed "Mitchell & Company."

Q. Signed "Mitchell & Company."

A. Yes.

Q. You are sure of that?

A. That is my recollection of it.

Q. Mr Bruning, is not this true, that before they

ever started to sluice up at all, Fallon had been there and borrowed some small amounts of money and gave his notes at different times, and that afterwards those notes were taken up and put into a large one, $850.00, and signed by Fallon & Mitchell? Examine that. (Hands a paper to witness.)

A. If the Court will excuse me, I think I can find the small notes in a small pouch at the American Bank of Alaska, of J. J. Fallon.

Q. That memorandum should refresh your recollection, I should think.

A. The memorandum says: "Note No. 622, $850. Refund to A. Bruning to apply overdraft July 19th, $500., and to apply on note $154.13." That note on which the $154.13 is applied is still in the bank.

Q. Ain't that memorandum to your bookkeeper that you are looking at now, made on the 31st, ain't that just your memorandum to him so that he would charge that all up?

A. I think so.

Q. That is what I thought, Mr. Bruning, this (referring to a paper) is dated July 8, 1913; now, ain't it true that this is simply a renewal note of some other notes?

A. No sir.

Q. Do you say that you advanced the money to Fallon, $850.00, on July third?

A. To Mitchell & Company.

Q. On that day, on this note?

A. I think the books will show it.

Q. Answer my question. You say that you advanced to Mitchell & Co., on that note which I have just showed you, on July 3rd?

A. There are the records; that is what we keep records for.

Q. This is the same note of $850.00 that you carried for that firm until you closed down on them on July 31st?

A. Carried it until the cleanup that was brought into the bank on July 31st. Yes.

Q. Mr Bruning, you spoke of a $115.00 note, didn't you?

A. No.

Q. $154.13. When was that given?

A. The note is still in the bank as part payment to apply on this note.

Q. That is another note separate from this $850.00 note?

A. Yes sir.

Q. July 3, 1913, is when they delivered the first cleanup, wasn't it?

A. The books are there.

Q. What?

A. The books there should show.

Q. Don't you think that is about the date?

Mr Clark: Show him the book and let him testify from the book.

Mr Pratt: Where is the book?

Mr Clark: There is your own book. (Indicating bank book in evidence.)

Mr Pratt: July 3rd, 135.81 ounces at $16.50 amount to $1904.75. I have read that correctly. Does that refresh your memory as to when the first clean-up was brought it?

A. I suppose so. I don't pretend to memorize any banking affairs; that is what the records are for.

Q. And you tell this jury that on that date the firm of Mitchell & Co. signed up a note by James J. Fallon and Thomas Mitchell for $850 and got the money on it?

A. Don't the books show there?

The Court: Do you desire the records to testify from?

A. Absolutely.

Mr Brown: That should be the 8th of July.

Mr Pratt: It looks like either the 3rd or the 8th.

A. The record shows here that on July 8th the firm of Mitchell & Co. was credited with the proceeds of an $850.00 note.

Q. What were the amount of the overdrafts when that first cleanup came in?

A. $155.14.

A. $155.14 on the third of July.

A. No; on the third of July it was $6.90. That is the overdraft on June 28th.

Q. June what?

A. At the end of the day's business on June 28th

the account was overdrawn $6.90.

Q. I asked you how much it was overdrawn on the 3rd of July?

A. It was the same balance, and the note. On July 3rd at the end of the day, after all the checks were taken care of that came in at the same time as the cleanup was deposited, the balance was $155.14 in the red at the end of the day on July 3rd.

Q. How much had they overdrawn by July 8th?

A. At the end of the day of July 7th they had an overdraft of $795.46.

Q. Yes; now take the next day.

A. On the next day the deposit of the proceeds of the $850.00 note put them $18.54 to the good, a credit.

Q. What became of that $1904.00 between those dates?

A. There is a whole list of checks; do you want me to read them off?

Q. They checked it off, checked it out?

A. I expect so, yes.

Q. They checked it all out, and by the 7th of July they were $154.00 behind?

A. No.

Q. How much?

A. On the 7th of July they were $795.46 behind.

Q. So they checked the nineteen hundred and four dollars out, and seven hundred and ninety-four besides?

(Defendant objects as immaterial; whereupon

another question is put to the witness.

Q. You required them to give a note to cover that overdraft at that time?

A. I did.

Q. How much were they behind? That just about squared them, didn't it?

A. Yes sir.

Q. How much were they behind at the end of the next cleanup?

(Defendant objects as immaterial, and not proper cross-examination. Objection overruled.

Exc. 34.

Defendant excepts. Exception allowed.)

A. At the end of the day on the 16th they were $133.71 overdrawn.

Q. What was the cleanup that came in that?

A. $2213.14.

A. And they were behind at that juncture how much?

A. They were overdrawn $133.71.

Q. Now then, run ahead a few days?

Mr. Clark: How many days?

Mr Pratt: Run ahead a few days, to the 18th. What was the condition of the account on that day?

(Defendant objects as immaterial. Objection overruled.

Exc. 35.

Defendant excepts. Exception allowed.)

A. At the end of the day on the 18th it shows an overdraft here of $527.69.

Q. Take the 20th of that month, what did it show?

A. On the 19th there is a credit here; do you want that?

Q. On the 19th there is a credit of how much?

A. Proceeds of a note, $500.00.

Q. What note was that?

A. That was a note that I put in to cover the overdraft.

Q. You just put it in?

A. Yes.

Q. How did the balance stand when that was put in?

A. They kept on checking pretty busy, and at the end of the day they were $599.44 overdrawn after getting that credit of $500.00.

Q. Now take the 25th; what was the state of the account?

A. On the 24th they were $2177.14 overdrawn.

Q. Take the 28th?

A. $2206.14 overdrawn.

Q. The 29th?

A. The same as the 28th.

Q. Did you pay any checks after that?

A. On the 30th paid a check of $40.00

Q. That is the last check you paid, is it not?

A. Yes sir.

Q. What is the exact overdraft there?

A. $2246.14.

Q. $2246.14 on the 30th of July.

A. Yes.

Q. Now, Mr. Bruning, wasn't there a check of about $400.00 presented to you by a man named McLean on that day, the 30th?

A. I don't remember,

Q. Didn't you reject a check of that amount made to McLean or someone else on that day?

A. I may, I don't remember.

Q. Don't you know that before the 31st you refused to honor any more checks?

A. I may have.

Q. You may have.

A. I don't remember.

Q. Had you made any inquiry of these men in the meantime now, up to the 31st, as to what property they had or what chance they had of paying anything outside of these mining operations?

(Defendant objects as immaterial. Objection overruled

Exc. 36.

Defendant excepts. Exception allowed.)

A. No.

Q. You were depending altogether upon the success of that mining venture?

A. Certainly.

Q. You intended to buy this third cleanup and put it on the books and let them check it out in the usual way, just the same as you had the other two?

A. I don't know that I could answer that question that way.

Q. I ask you to answer it; answer it any way you want to.

A. I don't want this to be part of the record—

Q. Oh yes, it will be. Say what you want to say; answer it any way you want to.

A. Suppose a man had a $5000.00 overdraft and he brought in $4000.00 in cash to deposit, and he wanted to check $10,000.00, I suppose I should honor $10,000,.00 worth of checks on that account?

Q. That is not my question. You intended when that third cleanup came in, to credit it on the books to Mitchell & Co., and let them check it out just as you had before, didn't you.

A. I put it to their credit the same as I would anybody's else account.

Q. You thought the cleanup would be $8000.00, or about that, didn't you?

A. I had no idea as to what it would be; I couldn't tell. All I knew was that Mr. Fallon told me that the boxes looked good.

Q. Didn't he tell you that Mitchell & Fawcett had told him that there ought to be $8000.00 there?

A. He may have done so; I don't know.

Q. Can't you tell as significant a thing as that, whether he told you that, that Mitchell had told him that the cleanup ought to be as much as $8000.00?

A. He may have done so. I don't deny that he did or didn't.

Q. Isn't it true that when Fallon came in you

thought he was bringing you in a cleanup of $8000.00?

A. I heard in the morning from Coghill that the report on Ester was that they had a $10,000 cleanup.

Q. And you thought, until he got there with it, that it would be $8000.00 or $10,000.00 didn't you?

A. I had no business thinking anything until I would see the cleanup.

Q. Wasn't that all the information that you had up to the evening of the 31st of July 1913, that that cleanup that Fallon was bringing in was $8000.00 or $10,000.00?

A. No.

Q. Did you have any other information that it was less?

A. No, I had no information; no information on that score at all, except hearsay—what other people said.

Q. You heard what Fallon told you over the 'phone?

A. No, I don't remember of Mr. Fallon talking to me that day; he may have.

Q. You remember what Coghill told you?

A. Coghill made an offhand remark in the bank in the morning, that the report on Ester creek was that they had had a $10,000.00 cleanup.

Q. You gave that credence?

A. What I give credence to is what I see in the book.

Q. You thought that was likely to be the truth,

didn't you?

A. No; why should I?

Q. All right. You knew, Mr. Bruning, at that time that Mitchell & Company were overdrawn with you all the time, almost every day?

A. Here are the records.

Q. Don't you know that?

A. Here are the records; they show it.

Q. Don't you know it?

A. Here are the records.

Q. Don't your records show that they were overdrawn all the time?

A. The records show that they were overdrawn most of the time.

Q. And that that overdraft kept increasing and piling up all the time?

A. That is the reason I took those means.

Q. At one time you made them give you a check of $850.00?

A. Sure.

Q. Did you ever try to do that again?

A. No sir.

Q. You were depending, were you, on the cleanup altogether?

A. I just put the cleanup to their credit and the overdraft was wiped out.

Q. You were depending on those cleanups; that was all you had to go on?

A. Sure.

Q. You knew those three men didn't have any

property?

A. I didn't know anything about that.

Q. Didn't you know they didn't own the machinery; that they bought that on time?

A. I didn't know a thing about that.

Q. You knew at that time that there were from 30 to 50 men working there?

A. No.

Q. Didn't everyone of those checks you got show that they were for labor bills?

A. No.

Q. Look at those checks issued between the 3rd of July and the 31st of July, and I want you to answer this question: If you don't know on the 31st of July that there were a large number of workmen out there and that Mitchell & Co.'s bills were mounting up to a large sum for laborer's bills and provision bills?

A. At that time Mr Rettig was the paying teller and he paid the checks. Mr McLean was the bookkeeper and he put the checks on the records. There might have been a hundred checks paid through the bank that wouldn't pass through my hands.

Q. Did you see any of those checks as they passed through the bank?

A. I don't know.

Q. Take a look of them and see what they show, every one. (Hands what appear to be checks to witness.)

A. There is nothing to show here that I saw this.

Q. Look and see if it says on those checks what they were for.

(Defendant objects as the witness testified he didn't know whether they passed through his hands or not. Objection sustained.)

Q. Didn't you know that there was a large number of working men out there?

A. I did not.

Q. Did you ever make any inquiry?

A. No sir.

Q. And you never saw those checks to make you know that they had?

A. Well, I have told you. There might have been a hundred checks that I have seen and a thousand that I haven't seen.

Q. Did anybody ever tell you that they had a large number of working men and that it cost a large amount of money for provisions?

A. No.

Q. Didn't you know it?

A. No.

Q. Did you ask them?

A. No.

Q. Just blundered along and took chances?

A. Sure.

Q. You didn't know they had any workmen working there at all, did you?

A. I didn't see anybody working there.

Q. Did you know there were any men working there?

A. It was hearsay with me that there was.

Q. Did you inquire to know how many men were working there?

A. No.

Q. Did you know of any bills they were contracting around town for mining supplies?

A. No.

Q. Did you know about them buying an engine, or something, some kind of implement from the N. C. Co. for $2000.00?

A. No.

Q. Didn't the checks go through your bank in part payment?

A. They may have; I don't know.

Q. Where is Rettig?

A. He is in the Tolovana now.

Q. You escape that now by saying that you didn't actually look at that?

Mr Clark: We object to his trying to insult the witness.

The Court: That statement may be stricken and the jury are instructed to disregard it.

Mr Pratt: Do you testify to this jury that you didn't see any of the checks that are there on that table?

A. It is possible that I never saw one, and I may have seen them all. I don't know that I saw one.

Q. If you saw one or more than one you knew that that was for a labor debt from Mitchell & Co. to a laborer, didn't you?

A. No.

Q. Isn't it marked right on the check?

A. I don't know.

Q. Didn't I show them to you and didn't you look at them?

A. I saw some checks there; yes.

Defendant objects as immaterial. Objection overruled.

Exc. 37.

Defendant excepts. Exception allowed.)

Q. Now, Mr. Bruning you have testified that you thought that firm was all right on the evening of the 31st, didn't you?

A. In the afternoon of the 31st; yes.

Q. On the afternoon of the 31st you thought that firm was solvent.

A. Yes, to the best of my knowledge.

Q. They then owed you $850.00 on one note, $500.00 on another, $154.00,—something like that—on another, and $2100.00 or $2200.00 overdraft, making I think about $4096.04, wasn't it?

A. The amount of the deposit, $3700.00 and some odd dollars—(interrupted)

Q. It amounts to more than that.

A. 15 per cent. royalty was taken out of the original amount.

Q. I am talking about how much that firm owed the bank; you know what I am talking about.

A. They owed an overdraft, $2246.14, and the notes, were charged up, as the statement you have

got there shows.

Q. What do they amount to, $1504.13?

A. Yes.

Q. You knew that, didn't you?

A. Certainly.

Q. Now, when that officer came in there with an attachment, you knew that the Independent Lumber Co. had a claim of $400.00 and over, didn't you?

A. In the evening they served me with a garnishment.

Q. You knew it then, and you knew that before that Mr McLean had a check for $400.00 that you turned down and refused to pay, didn't you?

(Defendant objects, on the ground that the witness has testified that he knew nothing about that. Objection overruled.

Exc. 38.

Defendant excepts. Exception allowed.)

Q. Didn't you know that?

A. I told you I did not know that McLean presented a check for $400.00.

Q. Do you remember of some people presenting Mitchell & Co. checks on the 30th, and probably in the forenoon of the 31st, that were turned down?

A. I don't remember of turning any down.

Q. Will you swear to this jury that you did not?

A. Yes, I will swear to the jury that I don't remember of turning any checks down.

Q. I am asking you will you swear that that bank

over there did not reject checks of Mitchell & Co. on the 30th and 31st?

A. Mr Rettig, as paying teller of the bank, may have, under my instructions, done so.

Q. How many checks were left there with you by people for collection?

A. I don't remember.

Q. What do you approximate the value or volume of them?

A. I don't know.

Q. About how many dollars?

A. I don't remember; I don't remember any of them.

Q. You must know that ; how many checks that Mitchell & Co. had issued and that there was no funds there to pay and you wouldn't advance any money. How many were lying right there waiting for another deposit?

A. I don't remember.

Q. Can you approximate the amount?

A. No sir.

Q. It was quite a large sum?

A. No sir. I don't know a thing about any of them.

Q. What were you doing around that bank at that time?

A. Looking wise, I suppose.

Q. You couldn't see these notes—these checks?

A. I don't remember any of them.

Q. You don't know there were some there all

right, left there for collection?

A. I don't know.

Q. Ain't that your best memory and belief, that there were some left for collection?

A. If there were any left for collection, the parties that left them would have a receipt. That would wipe it out from my mind. I don't trust to memory in banking. It is all black and white.

Q. Didn't you see them there after the 31st, lying there?

A. I don't know, I may have; I don't remember of any.

Q. Don't you suppose you could go to your bank and get them right now?

A. Send me over; I am willing to go.

Q. Don't you think they are there right now?

A. If you think so, I will go and look.

Q. You delivered them back to some of these people?

A. They may have been, I don't know.

Q. Don't you remember getting checks for collection drawn by T. Mitchell & Co., and holding them there for a time, and then delivering them back to the payees?

A. It may have been; that is what we have records for, to show it.

Q. But you can't give the amount in dollars, or any approximation of the amount of those checks that were left there for collection?

A. I don't remember a single one even being left

there.

Q. But you have said it was your best impression that there were some.

A. No, I didn't say that.

Q. I thought you did.

Q. Now, there is one thing you happen to say you know about, and that was that garnishment for $400.00 of the Independent Lumber Co. You have to admit that?

A. I don't remember the amount; I remember being served with a garnishment.

Q. And you say that didn't make any difference with you?

A. No.

Q. No. That was just nothing. So, before that, however, Fallon had come in with this gold dust, hadn't he?

A. Yes.

Q. And you had weighed it out?

A. Hopkins had weighed it, I believe.

Q. That was all done in a little bit after Fallon got in there?

A. No.

Q. Half an hour?

A. It might have been more than that.

Q. An hour?

A. I told you that it required a good deal of cleaning.

Q. Answer me; was that done in an hour from the time Fallon got there?

A. I don't know.

Q. An hour and a half?

A. It might have been done in five hours for all I care.

Q. Don't you know that Fallon came in from the train right over there with that gold dust?

A. I suppose he did.

Q. Give your best estimate of how long it before that gold dust was cleaned up so that you would know exactly what its value was.

A. I might bring Hopkins up here and he might remember. Hopkins handled the gold dust. All the transaction took place before six o'clock that night. If he got there at four it might have been an hour and a half.

Q. You are sure the whole thing happened, and it was all cleaned up and the amount ascertained before six o'clock?

A. Yes sir.

Q. And just as soon as you got it ascertained, you set it off against the notes and overdraft.

A. As soon as I made out the deposit slip, so that I knew how much the cleanup amounted to, I charged up the notes, as that slip shows.

Q. You made the setoff right then and there?

A. Certainly I did.

Q. Before six o'clock?

A. As soon as—(interrupted)

Q. (continuing)—on the evening of July 31st, 1913?

A. Yes sir.

Q. When Fallon came in, did you tell him or intimate to him that you were going to do that?

A. Yes sir.

Q. Did you tell him that?

A. Yes sir.

Q. That evening?

A. Yes sir.

Q. Mr Bruning, stop and think. Isn't this true; that you never said a word to him about that until the next morning about nine—between nine and ten o'clock—when he went there; that that is the time you told him you had done it?

A. No; my recollection is that I told him in the evening.

Q. Isn't it true that you told him that the next morning between 9 and 10 o'clock for the first time?

A. My recollection is that when Hopkins and Rettig were cleaning the dust that I told him that I—(interrupted)

Q. Who was there to hear that?

A. I was there, and he was there, I guess.

Q. Paul Hopkins was there?

A. They were not there when I was talking to Mr Fallon.

Q. They didn't hear that?

A. They were in the other room.

Q. Will you deny before this jury this; that the first time you told Fallon that you had set that clean-up off against the indebtedness of Fallon & Co. was

the next morning between 9 and 10 o'clock, on August 1st?

A. I state that the evening or the afternoon that the gold dust was delivered at the bank and the boys were cleaning the dust, that I told Mr Fallon that their overdraft amounted to so much on the ledger; that I would place the cleanup to their credit as soon as I ascertained what the amount was, and that I would charge the demand notes in the bank against the account.

Q. Are you sure you told him that evening?

A. I am sure; that is what I am saying, that I am sure of it.

Q. You are sure you told him that evening?

A. I am, yes.

Q. You are sure it didn't occur the first time the next morning?

A. I am sure I told him that evening—that afternoon.

Q. That very thing?

A. Yes sir.

Q. You told him you were going to set that off against the overdraft?

A. No.

Q. And the demand note?

A. I told him I would place the proceeds to their credit,—that would naturally wipe out the overdraft, —and charge them up with the notes. I told him the overdraft amounted to so much. I didn't say I was going to set it off against the overdraft at all. I told

him I would put that amount to their credit— that would naturally wipe off the overdraft—and I would charge them up with the demand notes.

Q. And you deny that that conversation occurred on the next morning and didn't occur on the evening of the 31st?

A. I say that occurred in the afternoon of the day that the gold dust was delivered.

Q. Do you remember the conversation that you had with Mr Fallon the next morning just before the bank opened?

A. I don't remember him being in the bank the next morning.

Q. Didn't he come in there between 9 and 10 o'clock, and didn't you then tell him that you would set that off against the indebtedness of Mitchell & Co., and didn't he then tell you that he had issued a lot of checks out on Ester Creek before he came in?

A. I don't remember.

Q. Didn't he tell you about issuing a lot of checks out at Cleary City? (Evidently means Ester instead of Cleary.)

A. Not as I remember.

Q. Did he tell you that the evening before this, when you told him you were going to set this off?

A. I don't think he told me that then.

Q. Don't you know that he told you that point-blank in the morning of August 1st in that bank?

A. If he had told me it wouldn't make any difference so far as I was concerned.

Q. Didn't he tell you that that meant that they would have to close down?

A. No sir.

Q. That they had issued a lot of checks out there to the men in a large sum of money?

A. No sir.

Q. Will you swear positively that he didn't?

A. To the best of my recollection he didn't.

Q. To the best of my recollection he didn't?

A. Yes, he didn't.

Q. You knew that when you took that money all these other claimants out here, these laborers and those who had furnished provisions and wood and everything, wouldn't get anything?

A. Judge, you understand they had gotten the benefit of that cleanup before it got to the bank. The checks were honored before even the deposit was made. It was upon the representation that that cleanup would come to the bank that I honored those checks and allowed them the overdraft.

Q. And when the cleanup showed only $3734.00, then you concluded you would not advance any more money.

A. Yes. Do you suppose I was supposed to advance about $5000.00 more?

Q. Didn't you make up your mind that you wouldn't cash any more over-checks when you saw that cleanup of $3734.00?

A. No, I made up my mind when I was served

with the garnishment; then I made up my mind that I wouldn't—(interrupted)

Q. Wait. You told this jury that you did all this before six o'clock—(interrupted)

Mr Clark: Let him finish his answer.

The Court: Finish your answer.

Mr Pratt: Didn't you tell this jury a while ago that that was all finished before six o'clock?

The Court: You may finish your answer, if you have not finished it.

(Question and answer read as follows: Q. Didn't you make up your mind that you wouldn't cash any over-checks when you saw that cleanup of $3734.00? A. No, I made up my mind when I was served with the garnishment; then I made up my mind that I wouldn't—)

A. (continuing—that I wouldn't cash any more checks or allow any more overdrafts.

Mr Pratt: Haven't you told the jury here distinctly that that setoff was made and the whole thing closed up prior to 6 o'clock that evening?

A. Yes, but you asked me if I wanted to pay any more checks.

Q. Didn't you tell—I asked you if you hadn't made up your mind by 6 o'clock to do that, and you have tried to say no, that you didn't make up your mind when the garnishment was served.

Mr Clark: He didn't testify to that at all.

Mr Pratt: Yes, he did.

The Court: You have been talking about two dif-

ferent things; one is about overdrafts and the other is about the time when the setoff was made.

Mr Pratt: Didn't you say a while ago that that setoff was all accomplished prior to 6 o'clock on the evening of the 31st of July 1913, didn't you so testify?

A. I have told you and will tell it again; that we made the credit as soon as the dust was weighed, and right after that I charged up the notes.

Q. That was before 6 o'clock?

A. That was before 6 o'clock.

Q. And from that time on you didn't intend to cash any more checks for Mitchell & Co.?

A. Then you said that Mr Fallon told me that he had issued checks for large amounts.

Q. You are talking about something else.

A. No; you asked me that; you said that Fallon came in and said he had issued checks for large amounts to the workmen and others; and, according to your idea, I suppose I should go on cashing them even with a small cleanup.

Q. You now want to tell the jury that you didn't make up your mind to make that setoff and not cash any more checks until that attachment was served.

A. No, I said I made up my mind not to allow any more overdrafts when that attachment was served.

Q. Ain't that what I have been talking about?

A. I don't know what you are talking about.

Q. I tried to get you to tell when it was that you

made up your mind that you wouldn't cash any more checks of T. Mitchell & Co,—overchecks. That was 6 o'clock, was it?

A. No.

Q. When was it?

A. I told you after the garnishment. The testimony will show that I was garnisheed about 8 or 9 o'clock.

Q. Then you made up your mind for a certainty that you wouldn't cash any more checks if they were overchecks?

A. Certainly.

Q. You knew then that Mitchell & Co. didn't have anything on file?

A. I knew they had nothing to their credit.

Q. That meant that you were not going to cash checks at all?

A. As long as I wasn't allowing any overdraft.

Q. Why wouldn't you cash any more checks for them?

A. Because when a house is on fire I am not going to place insurance.

Q. You knew the house was on fire at that time?

A. Certainly. When a man jumps another with an attachment, it is about time to keep hands off.

Q. You knew at 6 o'clock that your house was on fire, didn't you?

A. I did not.

Q. You didn't think so?

A. No sir.

Q. You didn't know that there were men out there working, with big bills to come in, did you?

A. I didn't know a thing about it.

Q. You didn't know men had been coming there, a number of them, for a couple of days before that, trying to get checks cashed, and you wouldn't cash them?

Mr Clark: We object to those statements as absolutely contrary to the evidence.

The Court: Objection sustained.

A. I wasn't out there around the mine; I was trying to run our business.

Q. The next morning at 10 o'clock, when your bank opened, checks were offered then for payment, were they not?

A. I suppose so.

Q. You are not sure about that?

A. Mr Rettig was paying teller; I wasn't up to the window all the time.

Q. Don't you know that Mitchell & Co. checks came in there, running into several thousand dollars within a few days?

A. They may have.

Q. Don't you know it?

A. No.

Q. What were you doing there?

A. I was looking after the business of the bank. I was not keeping account of all checks that were presented and turned down, and things like that; we don't keep any record of that at all.

Q. How far were you sitting away from the paying teller?

A. I suppose I was pretty busy. Do you suppose I have nothing else to do but stay there and watch the paying teller to see what he is doing?

Q. In day time you walk over there frequently?

A. You have been in the bank often enough to see what I do.

Q. You remain there in daytime looking after that business and seeing that the business is transacted?

A. I see that the boys do their work.

Q. You knew from your supervision and inspection that checks of Mitchell & Co. in a large amount were offered there to be cashed within a few days after that, didn't you?

A. I know that in any business that pertains to the bank I invaribly depend upon the records, black and white, and not upon memory. That is the first lesson that a man gets, not to depend upon memory. If there is anything like that that took place in the bank, the records will show.

Q. Now, you want to tell this jury that you would have a record of a man bringing in a check in there and offering it, and you wouldn't pay it?

A. The man would have the check marked "Not sufficient funds". We don't keep any record of that.

Q. You hand it right back to him?

A. Yes.

Q. Don't you know there is no record of that?

A. If the man don't keep the record it is not up to the bank to keep the record in that respect.

Q. Mr Bruning, ain't this true, that when a check is presented there to Mr Rettig, the assistant cashier, and he is in doubt about whether it should be honored or not, don't he delegate it all to you?

A. He probably would ask me: "Will I pay this check?"

Q. Didn't you instruct him, when the bank opened on August 1st, 1913, not to pay any more of the T. Mitchell & Co. checks?

A. Very likely I did?

Q. Don't you know you did?

A. I suppose I did.

Q. You never paid any more of them after that, did you?

A. I don't think we did.

Q. Isn't it true that that money, or the sum of money that represents that gold dust, from 6 o'clock in the evening of July 31, 1913, that that sum of money was never at any time subject to check of T. Mitchell & Co. Isn't that true?

(Defendants objects as immaterial. Objection sustained.)

Mr Pratt: I want to know if that money was deposited in your bank subject to the check of T. Mitchell & Co. at any time; was it deposited there, I mean subject to check at any time after 6 or 8 o'clock in the evening of July 31st, 1913?

(Defendants objects, and the Court rules that the witness need not answer until Mr Pratt explains what he means by 'deposited subject to check').

Q. I mean a fund in your bank that if the depositor should issue a check and somebody should go there with it, that you would pay it. . . .

A. If there is a balance to their credit we will pay it.

Mr Pratt: Ain't that a fair question and a fair understanding?

Mr Clark: That is a fair understanding.

Mr Pratt: Now, was that sum of money subject to check, in the ordinary way of business now of banking, by T. Mitchell & Co. at any time after 6 or 8 o'clock in the evening of July 21, 1913? That is a fair question. Now, answer that, whether it was or not.

A. It was a checking account like all other accounts, and checks will be honored against an account, where there is a balance, or if there is an arrangement for an overdraft.

Q. You call that an answer, do you?

A. Yes.

Q. It just don't answer anything. Would your bank have cashed a check of T. Mitchell & Co. at any time after the hour that I have named?

A. Not after 9 o'clock at night. No.

Q. Would you the next day?

A. No.

Q. Therefore, Mitchell & Co. didn't have any de-

posit subject to check after 6 or 8 o'clock in the evening of July 31, 1913, did they?

(Defendant objects as incompetent, and is apparently an attempt to show that it was not a deposit made in the ordinary course of business the same as all other reposits are made. The Court sustains the objection on the ground that the question has been heretofore answered.)

Q. Mr Bruning, Fallon got in after the train, didn't he, on the evening of July 31st?

A. That has been testified to.

Q. He got in that evening?

A. I suppose so.

Q. And he came right over to the bank?

A. I think so; he may have stopped on the way and taken a drink; I don't know.

Q. In a very short time you had ascertained that the cleanup was $3734 and some cents?

(Defendant objects as having been gone into several times. The Court allows witness to answer.)

Q. You had ascertained the value of that, as I understood you, before 6 o'clock?

A. Yes.

Q. And you had in fact set it all off against the indebtedness of T. Mitchell & Co. prior to 6 o'clock?

A. I put the proceeds to their credit and charged up those notes before 6 o'clock.

Q. That means you set it off before that?

A. I don't know what you mean; that is what we did.

Q. Had you in the meantime consulted your attorney?

A. No sir, I didn't need any consultation.

Q. Did you during that evening?

A. No sir.

Q. Now, the bank books here show a deposit on August 1st, dont they?

A. The individual ledger shows it as entered on August 1st.

Q. Does this pass book? (Hands book to witness.)

A. That shows it as on the 31st there.

Q. How much was this firm in the red in your book, if you extended this book on the evening that you made this setoff, how much in dollars?

(Defendant objects as heretofore testified to. The Court directs Mr Pratt to hand the book to the witness, so as to enable him to make the calculation, and Mr Pratt hands said book to the witness.)

A. What is it you want to know?

Q. How much was that firm in the red on the evening of the 31st?

A. On the afternoon of July 30th, as well as upon the 31st, at 3 o'clock, when the bank closed, they were overdrawn $2246.14. Between 3 and 6 o'clock they made a deposit of this amount of gold dust, which was put to their credit, and that wiped out the overdraft and left a balance which was charged up to the notes of $850.00, $500.00, and what that other item is.

Q. When did you put those notes on that running account, just as though it was a checking account?

A. As soon as the credit had been placed, that is, when the gold dust slip had been given to me, I made out the deposit slip. I ascertained how much the deposit amounted to above the overdraft, and I went to work and applied the surplus on those notes; that is, I charged the notes, treated them the same as a check; charged the notes against the account.

Q. The amount was $4690.00—(interrupted)

A. It is $1504.00.

Q. I mean the whole of the aggregate of the overchecks was $4896.00?

A. No. Thirty seven hundred and—(interrupted)

Q. I am talking about the debt of T. Mitchell & Co.—the whole debt, that is.

A. I am talking about the $2246.14 overdraft, and the $1500.00 and some odd dollars that was applied on the notes. That don't make over thirty seven hundred and some odd dollars.

Q. There must have been more; you got it to $4096.00.

A. I never got any $4096.00.

Mr Brown: They are talking about different things.

A. The royalty went to Hoffman, 15 per cent. of the whole amount.

Q. Mr Pratt wants to know how much Mitchell & Co. owed the bank after the application was made.

Mr Pratt: Well, how much do Mitchell & Co. owe the bank?

A. Between the notes and overdraft and all?

Q. Yes, put them all together.

A. There are some notes in the bank there yet.

The Court: Do you know what the amount is?

A. No, I do not.

Q. You don't know at this time how much Mitchell & Co. owe the bank?

A. Yet? No.

Mr Pratt: Have you that bank book there?

A. Yes.

Q. If that book had been extended, and showed these entries in the red, it would show something like $4000.00 at the time you made this setoff?

A. No; it wouldn't show any $4000.00 in the red. If I had kept on honoring checks and paying checks it might have been ten thousand dollars in the red; I don't know anything about that.

Q. If you treated these notes the same as checks —the checks are $2200.00 and something?

A. Yes.

Q. And the notes run into that would run it up to about $4006.00?

A. No. It couldn't be possible, for the simple reason that a note is a debt. If I wipe out a note it would create another debt.

Q. You told the jury that you took the notes and treated them as a check?

A. As a check, against the balance that was left after the overdraft was wiped out by the deposit.

Q. You know a man by the name of Tony Liongavich?

A. No.

Q. I show you that check. (Hands same to witness). See if that refreshes your memory. See if you remember of that man presenting that check to the bank?

A. I don't remember him at all.

Q. That was about 10 o'clock. That was just as soon as the bank opened on the first day of August 1913.

A. I don't know anything about that.

Q. That don't refresh your memory. Now, didn't this man Liongavich come there about 10 o'clock and present this check, and didn't you tell him that you wouldn't pay it because the bank account of Mitchell & Co. had been attached?

A. I don't remember.

Q. You might have told him that?

A. Yes, or somebody else might have told him; I don't know.

Q. Can you give us an idea, in minutes and hours, whatever it is, of the time that elapsed between the time that you ascertained the value of that gold dust and the time that you made the setoff?

A. Well, all transactions between the purchase of the gold dust and the crediting on the ledger was done between 6 o'clock that night.

Q. You don't answer my question. How much time elapsed, minutes?

A. If he got in at 4 o'clock or half past 4, it would have been an hour and a half. I don't know.

Q. You know when the train came in?

A. No, I don't.

Q. Don't you know the train came in that time at 5 o'clock?

A. I don't know.

Q. You don't remember?

A. No.

Q. As a matter of fact, it was done immediately. As soon as you ascertained the value, you made the setoff?

A. As soon as the dust was cleaned and the clean dust weighed and the deposit made, as I told you, the setoff was made.

Q. And that setoff was made with reference to everything that T. Mitchell & Co. owned, notes and overchecks?

A. It was all Mitchell & Co. owed that was charged against that.

Q. This small book shows that the deposit, as you call it, was made that evening, the evening of the 31st?

A. The afternoon of the 31st. Yes.

Q. Did you have his book there—Mr Fallon's book there?

A. I don't remember.

Q. You don't remember whether he handed it in?

A. The entry in the book is made by the bookkeeper. He might not have made that until the day that the book was balanced. I don't know.

Q. You don't remember whether Fallon handed the book in with the gold dust?

A. I don't remember; no.

Q. Well, now, what paper is it that you rely on there in that bank to show you when a transaction takes place; the pass book of the depositor or this sheet? (indicating).

A. That is the individual ledger. It shows all deposits and all checks, all transactions a depositor may have with a bank.

Q. Which do you rely on for your own guidance? You were talking about records a while ago. What do you, as a banking man, rely on over there?

A. I refer to any records; some are teller's checks, some are depositor's checks, some pass books, and some twenty-dollar gold-pieces.

Q. Deposits all go on this sheet?

A. If a man makes a deposit to a checking account. Yes.

Q. If you have charged up the overdrafts as you call them—(interrupted)

A. We don't charge up any overdrafts; no charging to be done there.

Q. Not on this paper?

A. We don't charge any overdrafts. No. You

charge the checks and the checks create the overdraft, but you don't charge the overdraft.

Q. You charge the checks on this paper?

A. Yes; we do.

Q. Did you charge these notes the same as checks on this paper?

A. Yes sir.

Q. And you made a record here of when the setoff took place, didn't you?

A. The record shows when the deposit was made, on the individual ledger.

Q. I ask you to look at that paper and see if that does not show a deposit on the 31st, the same as that small book, and a setoff the next day, on the 2nd?

A. A deposit shows here, entered here on August 1st of $3734.12.

Q. When was the setoff created?

A. There was an entry made here—(interrupted)

Q. When is the setoff said to have been placed upon that paper; don't it show August 2nd?

A. It shows $1485.00 on August 1st.

Q. On August 1st?

A. Yes.

Q. What is that other data there of August 2nd?

Q. Nineteen thirteen was on August 2nd.

Q. What is that nineteen thirteen?

A. That is the difference between what the gold dust brought at $16.40 and what it went better after the assay. The gold was purchased at the rate of $16.40 an ounce, with the understanding that if upon

an assay it went better than $16.40—because you never can clean it down fine enough—that they would get the benefit of that credit; if, however, it did not go $16.40 the bank would sustain a loss.

Q. Can you tell, by that sheet of paper, when that setoff was made, took place?

A. The notes were charged on this individual ledger account on August 1st.

Q. When was the other?

A. The nineteen thirteen was August 2nd.

Q. As a matter of fact that had all been paid by this deposit the evening before?

A. No, no; well, to a certain extent, yes. Not the nineteen thirteen.

Q. That is, nineteen dollars—(interrupted)

A. Yes.

Q. All except that?

A. Yes.

Mr Pratt: We offer this in evidence.

(Defendant objects to its being introduced in evidence as it is a part of the bank's records, and was not offered in evidence by defendants, but merely used as a memorandum to refresh the recollection of the witness. It is an original page of the looseleaf ledger. Agreed that it may be withdrawn at the close of the case, if admitted in evidence, and defendant offers no objection to its introduction, if it can be so withdrawn. Whereupn it is admitted in evidence and marked as "Plaintiff's Exhibit M.", which exhibit is as follows:)

166-a

SHEET NO.....

Average Daily Balance

For Days $

THOMAS MITCHELL

	DATE 1913.	MEMORANDUM		TOTAL CHECKS	DEPOSITS	BALANCE
	June 11				200.	200.
			20			
	16			20		180.
		74.75				
	19	100.		174.75	100.	105.25
	23			67.15		38.10
	26					
			20			18.10
	26			20.		
						6.90
	28			25.		
		22.87				
	July 3	126.90				
		5.				
		5.				
		110.				
		25.62				
		110.90				
		84.				
		15.		505.29		
			96.30			
	3		18.50			
			469.50			
		83.40		584.30		
		200.				
		75.				
		100.				
		100.				
		100.				
			5.	658.40		
			100.			
135.81 at 16.50			200.	305.	1204.75	
		10.				155.14
	4	25.				
		54.25				
		84.87				
		47.80				
		133.65				
		10.				
		10.		375.57		530.71
			69.17			
	5		10.			
			173.25			
			50.			
			65.			
		30.		367.42		898.13
	7	32.52		62.52	165.19	795.48
			5.			
	8		31.	36.	850.	18.54
		20.				
	9	10.		30		11.46
			15.			
	10		2.50	17.50		28.96
		29.25				
85 pct.-157.80 at 16.50	15	50.50		79.75	51 cks. 7-16-13.	108.71
	16			25.		133.71
		24.	7.37		2213.14.	
		12.50	120.			
	17	200.				
		200.	115.			
		32.50	100.			
		52.50	55.			
		20.	54.			
		119.	250.			
		29.25				
		57.50				
		30.				
		305.50				
		85.				
		49.50				
		75.				
		20.		2013.62		65.81
	17			90.		24.19

166-b

ACCOUNT NO .....

Name MITCHELL & CO.

Address Per JAMES J. FALLON EVA CREEK

DATE 1913	MEMORANDUM		TOTAL CHECKS	DEPOSITS	BALANCE
18	20.				
	40.50				
	43.				
	300.				
			503.50		527.69
19		70.			
		124.90		500	
		88.			
		40.			
		21.60			
		40.			
		12.			
		140.	571.75		599.44
		35.25			
19	14.75		314.75		814.19
	200.				
21		17.50			
		125.			
		80.			
		200.	422.50		1236.69
21	6.				
	60.				
	25.				
	127.50				
	31.75				
	30.				
	10.		280.25		1516.94
23		46.			
		75.			
		25.			
		30.			
		47.25			
		13.20			
		74.25			
		62.50			
		140.	513.20		2030.14
24	106.				
	9.		115.		2145.14
24			32.		2177.14
26		5.	5.		2182.14
28			24.		2206.14
30			40.		2246.14
85 pct. 267.87 at 16.40.					
Aug. 1			1485.	3734.12	2.98
Bal. $22772			19.13	16.15	0.
			67 cks short 8-2-13.		
Aug. 16	2.55 acct 16.50 Black Sand			49	49.
Sept. 24			49.		0.

(Endorsed: "No 2011. Pltfs Exhibit M., Geo. Johnson Trustee Plaintiff vs. Am. Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska, 4th Div. Nov. 2 1915 J. E. Clark Clerk by Sidney Stewart Deputy.")

Mr. Bruning, when that cleanup was delivered there to you, now, you knew and believed that that was all the gold dust that was gotten at that cleanup, did you not?

A. I supposed so.

Q. You thought so, and you knew and believed that if you took that they would have to close business?

A. No sir.

Q. You didn't?

A. No sir.

Q. Didn't Fallon tell you so?

A. No sir.

Q. Have I asked you anything about a conversation with Herman Fawcett, one of these partners, on the evening of the 31st? Do you remember him coming in there?

A. I don't remember him at all.

Q. Do you remember of him coming in and asking you if that gold dust was subject to be attached; that a man by the name of Nelson had a claim of $1000.00?

A. He may have come in there; I don't remember if he did. Is Fawcett in the room here?

Q. You heard from some source that evening that Nelson was threatening an attachment on a $1000.00 claim?

A. All I have any recollection of is being served with a garnishment in that Rutherford matter.

Q. You go right off onto something else.

Mr Clark: He has answered the question.

Mr Pratt: He has not; you don't answer it at all Didn't you hear that evening from Herman Fawcett or from somebody else, or from some source, that a man by the name of Nelson was threatening to bring an attachment action to try and seize that same gold dust on a claim of $1000.00 against T. Mitchell & Co.?

A. To the best of my recollection, no.

Q. You don't want to be any too positive about that?

A. I am positive to the best of my recollection.

Q. Have you testified that that leaf that is introduced in evidence, what that is from?

The Court: What is that question? .

Mr Pratt: I ask Mr Bruning what is that leaf, out of what book?

A. Individual ledger account.

Q. The daily transactions with individuals—(interrupted)

A. Yes sir.

Q. —are entered there, are they not?

A. Yes sir.

Q. Supposed to be in full?

A. Yes.

Q. Is that the record you consult, Mr Bruning, when you want to inquire whether a check of a particular individual ought to be honored?

A. Certainly.

Mr Pratt: That it all.

Redirect Examination, By Mr Clark.

Q. Did I understand from your statement a while ago that so far as the bookkeeper's entries are concerned, his day closes at 3 o'clock

A. It does; yes sir.

Q. And any transaction that the bank has after 3 o'clock is entered under date of the next day's business?

A. Yes sir.

Mr Clark: That is all.

Defendant Rests.

JAMES J. FALLON, called in rebuttal for plaintiff, heretofore sworn, testified as follows:

Direct Examination, By Mr Pratt.

Q. Mr Fallon, will you state to this jury when it was that you first learned from Mr Bruning that he had a setoff to the amount of the value of that clean-up against the indebtedness of T. Mitchell & Co.

(Defendant objects as already testified about. Objection overruled.

Exc. 39.

Defendant excepts. Exception allowed.)

A. That was the morning of August 1st when I went in there, the morning of August 1st. I remember Mr Bruning talking. He had been waiting on a customer that was in the bank, and Mr Hopkins was behind on the scales. I had the poke. Mr Fawcett was in there—(interrupted)

(Defendant moves that the answer be stricken out

as not responsive, the latter part of the answer. Objection overruled.

Exc. 40.

Defendant excepts. Exception allowed.)

A. (continuing)—and I remember Mr Bruning saying something. And I had been so excited over the day's proceedings of the man getting killed, and so on, and the smallness of the cleanup, that I remember distinctly Mr Bruning saying: "Hello, there, Jim," and saying something else, I suppose it was pertaining to the cleanup. I think he said: "How is the cleanup? Have you got a big cleanup?" or something like that. And I said: "No, not so big as we thought it was." With that Mr Hopkins was ready to wait on me and I gave him the dust over. And I called back there that evening,—I think it was probably three-quarters of an hour afterwards, or so, between that and 7 o'clock, or so,—and they were busy doing something there, and Mr Hopkins said he had not finished the cleaning of it up. He couldn't blow it on account of the coroner's jury being out there, and we were all busy and didn't have time to blow it—(interrupted)

(Defendant moves that the answer be stricken out as not responsive.)

The Court: I do not know what he intends to state. He was talking about the 1st of August, when he came back to July 31st.

Mr Pratt: Was there anything said to you upon the evening of the 31st, by Bruning or anybody else

in that bank, that the value of that cleanup had been set off against the firm debts?

A. Not to my knowledge.

Q. When was it first?

A. On the 1st of August in the morning.

Q. Are you sure of that?

A. I am pretty certain of it.

Q. What had you expected and intended to do from the time you got in to the bank with the clean-up in the evening and the time you talked to Mr Bruning the next morning?

(Defendant objects as not rebuttal, and asking for his speculation, expectation, and what he intended to do. Objection sustained.)

Q. State when it was that you notified Mr Bruning that if the checks of that firm would not be honored that you would have to shut down?

(Defendant objects as assuming that something has been testified to that is not in evidence. Objection overruled.

Exc. 41.

Defendant excepts. Exception allowed.)

A. Well, Judge Pratt, those words never came out of my mouth in my testimony, about me shutting down.

Q. Some different words then?

A. No sir.

Mr Pratt: That is all.

Cross-Examination, By Mr Clark.

Q. There was an accident, a man was killed, out

at your works that day?

A. Yes sir.

Q. And the cleanup you had was not cleaned up very clean on that account?

A. It was not.

Q. And you were a little bit excited when you came into town?

A. Yes, everyone was excited.

Mr Clark: That is all.

Mr Pratt: That is all.

Mr. Marquam: We rest.

Mr Clark: We rest.

Testimony closed.

That thereafter, and before the arguments of attorneys or the instructions of the Court, the defendant made the following motion, to wit:

MR CLARK: At this time we ask the Court for a directed verdict, and move the Court for an order, directing the jury to bring in a verdict in favor of the defendant and against the plaintiff in this action, upon the ground and for the reason that there has been an absolute failure of proof on the part of the plaintiff of the things necessary to be proven to entitle them to a verdict in this case, and, on the contrary, the evidence clearly shows that the set-off made by the defendant bank in this action is a set-off of over-due notes held by said bank, against the credit standing in said bank to the general deposit account of the firm of T. Mitchell & Company, and

that the bank had a perfect right to make such set-off; and for the further reason that the evidence conclusively shows that the defendant had no knowledge, information, and had no reasonable cause to know or believe that, by receiving moneys upon the deposit made by T. Mitchell & Company, that it would secure a preference; and for the further reason that the evidence conclusively shows that the bank had no knowledge or information, or cause to believe, that the firm of T. Mitchell & Company were insolvent at the time said set-off was made and effected. And we ask the Court at this time to direct the jury to bring in a verdict in favor of the defendant and against the plaintiff in this action.

Which said motion was denied by the Court; to which defendant then and there excepted, and said exception was allowed.

Exc. 42.

That thereafter said cause was argued to the jury by counsel for the respective parties, and thereupon the Court instructed said jury as follows:

Gentlemen of the Jury:

I.

You are instructed that in this case the Judge and Jury have separate, though important, functions to perform. It is your duty to weigh and consider the evidence in the case, all of which is addressed to you. It is the duty of the Judge of this Court to instruct you as to the law in the case, and you are required

to accept as the law what is given you as such by the Court, and upon the law and the evidence to render a just and true verdict as you have sworn to do.

Your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find a verdict in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against a less number, or against a presumption, or other evidence, satisfying to your minds.

You are instructed that a witness willfully false in one part of his testimony may be distrusted in others. It is your duty to determine what is the truth of the testimony presented, and upon the facts of the case to render a verdict accordingly.

In civil cases the affirmative of the issue shall be proved, and when the evidence is contradictory, the finding shall be according to the preponderance of the evidence.

The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendant, he can not recover. In other words, if the testimony is evenly balanced, it shows that there is some doubt in your minds. That is not sufficient; that is, if the testimony of the plaintiff weighs just the same as that of the defendant, you must find for the defendant. The plaintiff can only

recover where his testimony outweighs that of the defendant.

You are instructed that evidence is to be estimated not only by its own intrinsic worth, but also according to the evidence which it is within the power of one side to produce and of the other to contradict, and, therefore, if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offering the same, the evidence so offered should be viewed with distrust.

You are the exclusive judges of the facts proven, of the credibility of the witnesses and the weight to be attached to their testimony.

In making up your verdict, you should not take into consideration any evidence sought to be introduced but excluded by the Court, or any evidence stricken by the Court from the record, neither should you permit the remarks or expressions of counsel to influence you in arriving at a verdict, unless such remarks or expressions are based upon the evidence in the case or are reasonably inferred therefrom.

2

In this case affirmative issues are presented by the plaintiff in his complaint, and, where the same are denied by the defendant, the affirmative allegations must be proven by the plaintiff by a fair preponderance of the evidence. An allegation in the complaint not denied is considered to be admitted, and proof thereof will not be required. If, however, in addi-

tion to denying such affirmative allegations, the defendant sets up an affirmative defense, the burden of proving such affirmative matter rests upon the defendant to establish the same by a fair preponderance of the evidence, if the same is denied by the plaintiff in his reply.

3

A copartnership is a voluntary contract between two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of profits thereof between them.

4

A depositor is one who pays money into a bank to be placed to his credit and to be subject to his check.

5

A general bank deposit is different from an ordinary debt in this: that from its very nature it is constantly subject to the check of the depositor, and is always payable on demand.

6

You are instructed that when a deposit is received after banking hours, and it is entered like other deposits, the debtor and creditor relation is created.

7

You are instructed that a deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for, when he parts with the

money, he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift, or security.

8

You are instructed that, in considering whether or not a deposit in the general account of T. Mitchell & Company was made in the defendant bank on the afternoon of July 31st, 1913, you have a right to consider all the circumstances connected with the transaction.

9

A bank deposit and a note of a depositor held by a bank are mutual debts which are subject to be set off against each other under section 68 of the National Bankruptcy Act, and the set-off by such bank of the amount of the deposit against the amount due on the note is not a transfer of property by the bankrupt as contemplated by the National Bankruptcy Act, and such set-off, if made in good faith, does not give a preference within the purview of section 60 of the National Bankruptcy Act even if the set-off is made within four months before the filing of the petition in bankruptcy.

10

The Court instructs the jury that the word "insolvent" as used in the pleadings in this case, means that on the 31st day of July, 1913, the aggregate of

all the property belonging to the copartnership firm of T. Mitchell & Co., and that of T. Mitchell, J. J. Fallon, and Herman Fawcett, the individuals composing such firm, was not sufficient at a fair valuation to pay the debts of such copartnership firm.

The phrase "reasonable cause to believe the transfer would effect a preference" means, as applied to the pleadings and evidence in this case, that at the time of such set-off by the defendant bank, some one or more of its officers had knowledge concerning the financial affairs of said copartnership firm of T. Mitchell & Co., sufficient to induce the belief in their minds of the insolvency of said firm, and that such set-off would effect a preference in its favor over other creditors. Actual knowledge of insolvency and that the set-off would enable the bank to get a greater percentage of its debt than other creditors of the same class might or could get, is not necessary or required under the bankruptcy law, but "reasonable cause to believe" such insolvency and preference is all that the plaintiff is bound to establish by a preponderance of the evidence.

11

I instruct you that the burden is on the plaintiff in this action to prove by a preponderance of the evidence every essential fact necessary to constitute his cause of action, and if you find that the evidence introduced by the plaintiff to prove any of the material allegations of his complaint merely creates a suspicion or doubt in your minds but does not satisfy

your minds by a preponderance of evidence, then you are to disregard said evidence if unsupported by evidence that does produce conviction; and I further instruct you that a transfer can not be avoided simply on proof that the creditor had doubt or suspicion that a preference was intended, for it is not enough that the creditor has some cause to suspect the insolvency of the debtor, but he must have such knowledge of fact as to induce a reasonable belief of his debtor's insolvency. And if the evidence introduced by the plaintiff in regard to knowledge or information possessed by the defendant shows that the defendant in this action may have had some suspicion in regard to the insolvency of T. Mitchell & Company, but that it did not have any reasonable cause to believe that the deposit made by said T. Mitchell & Company, if you find that such a deposit was so made by said T. Mitchell & Company, would effect a preference in favor of said bank, then I instruct you that your verdict must be for the defendant.

12

A preference consists in a person (1) while insolvent and (2) within four months of the bankruptcy, (3) procuring or making a tranfer of his property, (4) the effect of which will be to enable one creditor to obtain a greater percentage of his debt than any other creditor of the same class. Such a preference is voidable at the instance of the trustee if (5) the person recovering it or to

be benefited thereby has '(6) reasonable cause to believe that the transfer will result in a preference.

The burden of proving the existence of the essential elements of a transfer is upon the trustee seeking to avoid it, and in the case at bar unless the plaintiffs in this action have proven each and every one of the essential elements above set forth, by a preponderance of the evidence, then your verdict must be for the defendant.

The term property is a comprehensive term, and as used herein is broad enough to include money, gold dust, or anything of value.

13

If the jury finds from the evidence that on the 31st of July, 1913, the firm of T. Mitchell & Company did not make a deposit subject to check as hereinafter defined to you in these instructions, but did make a payment of a past due indebtedness, and that at that time the firm of Mitchell & Company was insolvent, and that said defendant bank had reasonable cause to believe that by accepting a payment it would secure an unlawful preference, and by so doing would secure a larger percentage of its debts than other creditors of the same class, then I instruct you such a payment, if you find it to be a payment, would be an unlawful preference, and your verdict should be for the plaintiff.

14

A deposit of money in a bank, upon an open account subject to check, is not a transfer constituting a pref-

erence, althought the bank, as a creditor, has a right to set off its claims against the deposit, and the action of a bank in applying a deposit or any portion thereof upon a depositor's indebtedness to the bank does not constitute a preferential transfer, if received in good faith by the bank in due course of business; and if you find from the evidence in this case that the bankrupt sold certain gold dust to the American Bank of Alaska, in good faith and in the due course of business, with the intention that said money be placed to the bankrupt's general account in said bank, and that such deposit was so made, then I instruct you that the bank had the absolute right to set off against said deposit any overdraft due from the bankrupt and any notes then due from the bankrupt to said bank.

15

A balance left in a deposit subject to check by the depositor may be applied by the bank to the payment of the depositor's indebtedness to it, without violating the provisions of the National Bankruptcy Act against preferential transfers, although the transaction was within four months of the bankruptcy proceedings against the depositor, and the bank at the time had reasonable cause to believe him insolvent. And I instruct you that, even had the defendant bank in this case known that T. Mitchell & Company were insolvent at the time they made a deposit on July 31st, 1913, if you find such a deposit was made, such knowledge of such insolvency did

not deprice the defendant bank of its right to set off against said deposit any indebtedness due from said T. Mitchell & Company to said bank.

16

An overdraft arises when a customer of a bank draws from that bank more money than is standing to his credit in his account with the bank. It operates as a loan on the part of the bank to the customer, and the amount thus overdrawn is usually in numerals in the customer's pass book on the right hand page in red ink, from which custom has arisen the expression "in the red." When this condition arises, the customer is indebted to the bank. A subsequent deposit or deposits, if in the aggregate equal to or greater than the amount thus designated to be due the bank, extinguishes the debt without any act on the part of the customer other than making such deposit or deposits. A deposit thus made is a deposit subject to check in its technical sense. By this it is not meant that the sum or sums so deposited may at once be withdrawn the same as if the customer were not indebted to the bank. They are subject to check in the sense that by the very nature of the relation thus created between the bank and the customer, the sum total of all deposits made by the customer while dealing with the bank are subject to his check.

Herewith I hand you the pleadings and exhibits in the case, together with the instructions I have just read to you for your guidance.

Forms of general verdict are also submitted to be used by you if you so desire in making up a general verdict.

A form of special verdict is also submitted in which five interrogatories are propounded and which are to be answered by you "Yes" or "No."

When you shall have agreed upon a general verdict, you will return the same into court, together with your findings or answers to the interrogatories submitted in the special verdict.

Given at Fairbanks, Alaska, November 3rd, A. D., 1915.

CHARLES E. BUNNELL,
District Judge.

That defendant requested the Court, in addition to the instructions already given, to instruct the jury as follows:

(a) A deposit consists of the delivery by any person to a bank of money, or its equivalent, for the purpose of having the same retained by said bank, with the duty on the part of the bank to credit the person so leaving the money, or its equivalent, with said bank. Deposits may be general or special. In case of a general deposit, the moment the money is delivered to the bank it becomes the property of the bank and the relation of debtor and creditor then exists between the bank and the depositor, and the bank is thereupon liable to such person so depositing said money for the value thereof, and the person so depositing the same may withdraw the same in a var-

iety of ways, among which is drawing checks against said deposit, which checks the bank is obliged to pay, unless, among other things, it has not sufficient funds to the credit of the drawer of the check to pay the whole check, or said bank has appropriated said money for payment of a debt from the depositor to the bank, or has a lien thereon for overdue indebtedness from the depositor to the bank, and the bank is not obligated in any way to pay orders against said deposit in whatsoever form they may be presented to the net credit balance standing on the books of the bank in favor of said depositor.

(b) You are instructed that, if you find from the evidence in this case that the proceeds of the gold dust sold to the bank on the afternoon of 31 July 1913 were credited to the deposit account of T. Mitchell & Company at the time of such sale, then the bank had an absolute right to set off the indebtedness of said T. Mitchell & Company to it against the amount thus deposited, and such set-off could be made immediately upon the ascertaining of the amount of the purchase-price of said gold dust and the crediting of the same to the deposit account of said T. Mitchell & Company, regardless of whether or not said T. Mitchell & Company were insolvent, or whether or not, at the time of said set-off, the bank had reasonable cause to believe that said T. Mitchell & Company were insolvent.

(c) The instructions given to you relative to pref-

erence and the right of a trustee in bankruptcy to recover a preference must be taken subject to the right of the bank to set off the deposits to the credit of an insolvent person or firm against the overdraft or notes of said bank due to said bank; and, in connection with the right of set-offs, I instruct you that, in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid.

(d) You are instructed that if at the time of the insolvency of any person, firm, or corporation, said bankrupt has a deposit in a bank and is indebted to the bank for notes or overdrafts, the bank has an absolute right to set off the notes and overdrafts held by it against said account, and if the bank did not do so, it is the duty, under the bankruptcy law, of the referee in bankruptcy to ascertain the state of said account and to strike said balance, and to set off said notes or overdrafts against said deposit account.

(e) Money which is turned over to an officer of a bank without any request that it be kept separate from the other funds of the bank, and which is entered upon the books as a general deposit, and a certificate of deposit issued for the amount, or an entry thereof made upon the general account of such depositor, if he has an account with said bank, is a general deposit, and is not in any sense a special deposit. A deposit has been further defined as the thing or the sums received from the depositor, and

a deposit in a bank is presumed to be a general deposit, in the absence of an agreement to the contrary. The purpose and terms of a deposit may be explicity stated or the intention of the parties may be inferred from their declarations considered in connection with their conduct and all the circumstances.

f) I instruct you that any delivery of money by a person to a bank, to be placed to his credit, is subject to check within the meaning of said expression, unless received and accepted by said bank as a special deposit in some form, not to be drawn against by check, and the right to check against said account is not an absolute right, even though said money is deposited subject to check, unless, after the making of said deposit, there is a credit balance in favor of said depositor, after the payment of any overdrafts that said depositor may have had and the charging against said account of any matured or overdue notes held by such bank against said depositor, and his right to draw out a sum of money equal to the amount deposited is limited by the right of the bank to set off its indebtedness against said amount so deposited, as you have been heretofore instructed.

(g) You are instructed that, where a bank holds a depositor's note, it has a right, at any time during the day on which said note falls due, or thereafter, to apply funds in its hands belonging to the maker of such note to the payment thereof, even where nothing will be left to the maker's credit to apply on checks.

(h) I instruct you that the enforcement by a bank of its lien or right of set-off by applying deposits, honestly made in the due course of business and without intent on the part of the depositor to prefer the bank, to the payment of the depositor's overdrafts and his notes in the bank's favor, as they mature, does not, although within four months of the bankruptcy proceedings against such depositor, constitute a preference forbidden by the National Bankruptcy Act, there being nothing in section sixty-eight of said act which prevents the parties from voluntarily doing before the petition is filed what the section itself requires to be done after the proceedings in bankruptcy are instituted.

(i) I instruct you that, if you are satisfied from the evidence in this case that the defendant bank made certain loans and permitted certain overdrafts to the firm of T. Mitchell & Company between their second and third clean-ups, upon the promise and agreement on the part of the said T. Mitchell & Company that they would deliver to said defendant bank the gold dust derived from the next clean-up, to secure or pay said loans and advances, then I instruct you that the transaction should be considered as the taking of security by said bank for a present loan or consideration, and the payment of said loan and advances by the delivery of said gold dust in accordance with the agreement, if you find such agreement was had, is not such a payment as would

constitute a preference in the contemplation of the National Bankruptcy Act.

That the Court then refused to give said instructions to the jury, to which refusal defendant then and there excepted, and said exception was allowed.

Exc. 43.

That, prior to the retirement of said jury and in the presence of said jury and after they had been instructed by the Court, the defendant made the following objections to the instructions already given by said Court, to wit:

(a) Excepts to Instruction No. 10 given by the Court, for the reason that no question of solvency or insolvency is involved in the case at bar, and is not, and could not be, involved in any issue arising out of the provisions of section sixty-eight of the National Bankruptcy Act, relative to set-offs, and the right of set-off, under the National Bankruptcy Act, does not depend, in any degree or at all, upon any knowledge or belief of the party making such set-off,—in this case the defendant bank,—as to whether or not the other party to the set-off is or is not insolvent, or whether or not the set-off would effect a preference in favor of the party making such set-off.

(b) Excepts to Instruction No. 13 given by the Court, for the reason that said instruction is an erroneous statement of the law, in that it limits the right of a bank to set off indebtedness of one of its

customers against a deposit account "subject to check."

Which said objections and exceptions on the part of defendant were by the Court overruled, and defendant then and there excepted thereto and said exception was allowed.

Exc. 44.

That defendant likewise, at said time and place, excepted to the Court's eliminating from defendant's proposed instructions certain parts thereof, to wit:

(c) Excepts to the Court's eliminating from defendant's proposed instruction, partially given in this cause as Instruction No. 8, the last portion thereof after the word "transaction", as given, which reads as follows: "And also the nature of the transactions concerning the sale of the two clean-ups theretofore sold to the bank by said T. Mitchell & Co., and the treatment by all parties of the proceeds of such sale, whether as deposits or otherwise, in the general account of said T. Mitchell & Co."

(d) Excepts to the Court's refusal to give, and elimination from, defendant's proposed instruction, partially given in this cause as Instruction No. 11, after the words "debtor's insolvency", the following clause, to wit: "And if you find from the evidence that the defendant in this case may have had some suspicion in regard to the insolvency of the firm of T. Mitchell & Co., that, in itself, is not sufficient."

Which said exception was then and there duly allowed.

Exc. 45.

That, before the retirement of said jury to consider their verdict and within the time prescribed by law, the defendant requested the Court to propound certain special interrogatories to said jury, consisting in five interrogatories, and the Court, in compliance with the request of defendant, submitted said interrogatories to said jury, to be answered at the same time their verdict was rendered.

That thereafter said jury retired to consider their verdict and said special verdict, and on the 3d day of November 1915 duly returned into said Court their general verdict, which was in the words and figures following, to wit:

[Title of Court and Cause.]

Verdict.

We, the jury, duly empaneled and sworn, do, from the law and the evidence, find the issues joined herein in favor of the plaintiff George Johnson, Trustee, and assess the amount of his recovery against the defendant The American Bank of Alaska at the sum of $3750.27.

Dated: Fairbanks, Alaska, November 3rd, 1915. J. M. Harris, Foreman.

(Endorsed: "Entered in Court Journal No. 12, page. 326. Filed in the District Court Territory of Alaska 4th Div. Nov 3 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

And at said time said Jury likewise returned into

Court their special verdict, which was as follows:
(Title of Court and Cause.)

Special Verdict.

We, the Jury duly impaneled and sworn to try the issues in the above entitled cause, do, in accordance with the evidence and the instructions of the Court, make the following findings to the special interrogatories submitted to us, as follows, to wit:

(1) Question: Did the American Bank of Alaska, on the thirty-first day of July, A. D. 1913, buy from Mitchell & Co., gold dust of the value of three thousand seven hundred thirty-four dollars and twelve cents ($3,734.12)?

Answer: Yes.

(2) Question: Were the proceeds of said purchase deposited to the general bank account of Mitchell & Co., at the time of said purchase?

Answer: .....

(3) Question: Did the defendant bank, at the time it credited the value of said gold dust to the deposit account of Mitchell & Co., set off the amount of the overdraft due from Mitchell & Co., and their then past-due notes against said deposit account?

Answer: .....

(4) Question: Did the defendant bank, at the time it set off the overdraft and over-due notes against the deposit account of Mitchell & Co., have reasonable cause to believe that the firm of Mitchell & Co. was insolvent?

Answer: Yes.

(5) Question: Did the defendant bank, at the time it set off the over-draft and over-due notes of Mitchell & Co. against their deposit account, have reasonable cause to believe that, by so doing, a preference would be thereby effected?

Answer: Yes.

J. M. HARRIS.
P. J. WENN.
DANIEL M'CABE.
H. BUZBY.
JOHN PERLENDA.
A. H. KELLER.
J. A. LILLIE.
E. N. BLAKELY.
J. BELLERBY.
D. HARTWIG.
C. N. CREAMER.
A. C. WOLFF.
Jurymen.

Dated: Fairbanks, Alaska, November 3rd. A. D. 1915.

(Endorsed: "Entered in Court Journal No. 13, page 326. Filed in the District Court Territory of Alaska 4th Div. Nov 3 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

That said jury failed and neglected to answer the questions Nos. 2 and 3, and were discharged without being required to answer said questions. That, after the jury had been deliberating for some time, they returned into Court and asked for further instruc-

tions as to the manner of answering the special interrogatories submitted to them by the Court, and particularly requested the Court to instruct them whether, if they were unable to, unanimously, agree on an answer to a particular interrogatory, they might answer such of the interrogatories as they could all agree on and not answer others at all, if there was a difference of opinion. The Court then, in the presence of the jury, called the attorneys for both parties to his desk, and said that it was his understanding of the practise that the jury was at liberty to answer such of the questions as they could all agree on and omit to answer others about which they were unable to agree, to which the attorneys on both sides acquiesced and consented, and on the suggestion of the Court that he would direct the jury that that effect orally, the said attorneys consented to such oral instruction, and thereupon the Judge of said Court instructed said jury orally in open Court, and in the presence of the attorneys for both parties, as follows:

The Court: "Gentlemen of the jury, it sometimes happens to the jury, as with a witness upon the stand, when special findings of fact are submitted in the form of a special verdict—interrogatories to be answered, that the jury, as a witness upon the stand, are unable to answer the question by yes or no. The theory in submitting findings or interrogatories to be answered, as these were, is that they could be answered by yes or no, but it may be possible that the ques-

tions can not be answered by yes or no. In that case, it is proper for you to make such answer as you believe is a proper and correct answer to the interrogatories submitted. However, if you find that there are any questions the answers to which you can not unanimously agree upon, you need not answer such questions. After you have unanimously answered as many answerable questions as possible, you should all sign said special verdict, which said special verdict is in addition to the general verdict, and return it into Court."

Foreman of jury Harris: "Do I understand you to say that, if we agree upon part of the questions, and we can not answer the rest of them, that we turn them into Court without an answer?"

The Court: "Yes sir; or, if you can not answer an interrogatory which is submitted to you by yes or no —if yes or no would not be a proper answer as you should unanimously consider the question, then you may make such answer to it as you unanimously agree and consider is a proper answer to make to the interrogatory submitted."

The jury then retired, and shortly afterwards came back into open Court, and through their foreman returned the verdict and answers to interrogatories as set out above, but at that time the attorneys for defendant made no objection to the form of the special findings, or the fact that two of them were left unanswered, and made no objection and saved no exception to the reception of said verdict and spe-

cial findings. Afterward, however, in the subsequent motions filed by the defendant complaint was made that two of said special findings had not been answered.

That, thereafter and within the time allowed by law, defendant filed a motion for judgment notwithstanding verdict, which was as follows, to wit:

[Title of Court and Cause.]

Motion for Judgment notwithstanding Verdict.

Comes now the defendant in the above entitled action and moves this Court for the entry of a judgment in favor of the defendant in the above entitled action and against the plaintiff in the above entitled action, notwithstanding the general verdict rendered on the third day of November, A. D. one thousand nine hundred fifteen, by the jury empaneled to try the issues in the above entitled cause.

This motion is made upon the following grounds, to wit:

(1) That the general verdict in this cause is contradictory to the answers of the jury to the questions propounded to them in the special verdict submitted for their consideration, which said special verdict and the answers of the jury contained therein show conclusively that the plaintiff is not entitled to the relief granted to him by the general verdict of said jury.

(2) That the special verdict of said jury and the answers to the questions therein propounded to said

jury show conclusively that, at the time the set-off alleged in the complaint and affirmative answer was made by the defendant bank, the relation of debtor and creditor existed between the firm of T. Mitchell & Co., bankrupts, and the defendant bank, at the time the set-off was made which is mentioned in the pleadings herein and in the special verdict of the jury herein.

(3) That the complaint herein does not state a cause of action in favor of the plaintiff as trustee in bankruptcy of the firm of T. Mitchell & Co. against the defendant.

(4) That said general verdict of the jury in this cause is not based upon a complaint which states any cause of action in favor of G. Johnson as trustee in bankruptcy of the firm of T. Mitchell & Co., against the defendant.

(5) That the jury in this cause did not unanimously agree upon a verdict in favor of the plaintiff upon the issues raised by the pleadings in this cause, and the special verdict rendered by said jury upon the questions propounded to them shows conclusively that the jury disagreed upon two or more of the essential and material issues in the case which were submitted to them, and that, without an unanimous agreement on said two essential and material issues, no valid general verdict could be rendered in favor of the plaintiff in this action.

(6) That it conclusively appears from the special verdict rendered by said jury, in answer to certain

questions propounded to them by the Court at the request of the defendant, that said jury found in favor of the defendant upon the special issues raised by defendant's affirmative answer.

JOHN K. BROWN,
McGOWAN & CLARK,
Attorneys for Defendant.

(Endorsed: "Due service hereof admitted this Nov. 6-1915 Louis K. Pratt, T. A. Marquam, Attorneys for Pltff.—Filed in the District Court Territory of Alaska 4th Div. Nov 6 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

That thereafter said Court overruled said motion, to which order defendant then and there excepted and said exception was allowed.

Exc. 46.

That, subsequent to the rendition of said verdict and special verdict and within the time prescribed by law, defendant filed a motion for a new trial, which was in the words and figures following, to wit:

[Title of Court and Cause.]

Motion for New Trial.

Now comes the defendant above named, and without waiving its motion heretofore filed for a judgment in favor of the defendant notwithstanding the verdict of the jury in favor of the plaintiff, and still insisting upon said motion, but in the event said motion is overruled, does now move this Court for an order setting aside the general verdict of said jury,

rendered and given on the third day of November, A. D. one thousand nine hundred fifteen, and giving and granting to this defendant a new trial of said action, upon the grounds following, to wit:

(1) Excessive damages, given under the influence of passion and prejudice, in this that, under no consideration, in view of the law relative to bankruptcy, could the jury have given a verdict for any sum in excess of the amount of the overdue notes held by said defendant bank and by it charged against the account of said T. Mitchell & Co., on the thirty-first day of July, A. D. one thousand nine hundred thirteen, as the receipt by said bank of the proceeds of the sale of the gold dust, would, immediately upon the receipt thereof, become the property of the bank, and would settle pro tanto any overdue indebtedness that then stood against the firm of T. Mitchell & Co. in favor of said bank, and it would only be the balance remaining to the credit of said T. Mitchell & Co. that could, in any sense, be treated as a preferential payment on said indebtedness.

(2) Insufficiency of the evidence to justify the verdict, and that said verdict is against law, in this that the preponderance of the evidence and the special verdict of the jury show conclusively that, on the thirty-first day of July, A. D. one thousand nine hundred thirteen, the firm of T. Mitchell & Co. made a general deposit with the defendant bank of the purchase price of the gold dust mentioned in the complaint, the amount of which deposit was afterwards

set off by said bank against the indebtedness due from said firm of T. Mitchell & Co. to said bank, and said evidence conclusively shows that said money, the proceeds of the sale of said gold dust, was not paid or delivered to the defendant bank as a payment upon any indebtedness due from the firm of T. Mitchell & Co. to said bank, but was delivered to said defendant bank in good faith on the part of T. Mitchell & Co. and the American Bank of Alaska, in due course of business, and was deposited by said bank in the general deposit account of said T. Mitchell & Co., and that said defendant, the American Bank of Alaska, had the absolute right to set off the amount of said proceeds of the sale of said gold dust against any, and all overdue indebtedness from said T. Mitchell & Co. to said bank.

(3) Errors in law occurring on the trial of this cause and excepted to by the defendant at the time, as follows:

(a) The Court erred in admitting in evidence plaintiff's exhibits B, C, D, E, F, G. G', H, I, J, K, and L, and each of said exhibits.

(b) The Court erred in admitting the testimony of Tony Lionovich to the effect that, on the morning of the first day of August, A. D. one thousand nine hundred thirteen, he presented a check drawn by T. Mitchell & Co. upon the defendant's bank, at said bank, and demanded payment thereof, and that payment was refused.

(c) The Court erred in admitting the evidence of

Harry Pratt, in regard to a conversation had by him with the officers of the defendant bank, about nine o'clock on the evening of the thirty-first day of July, A. D. one thousand nine hundred thirteen, relative to what was secured or attached under the writ of attachment in the case of Rutherford et al. vs. T. Mitchell & Co.

(d) The Court erred in admitting the testimony of James J. Fallon, relative to any conversations had with the officers of the American Bank of Alaska, on the morning of the first or second day of August, A. D. one thousand nine hundred thirteen, with reference to the cashing of checks.

(e) The Court erred in admitting the testimony of James J. Fallon, relative to checks drawn by him to the workmen employed by T. Mitchell & Co., on the thirty-first day of July, A. D. one thousand nine hundred thirteen.

(f) The Court erred in admitting the evidence relative to the financial condition of the firm of T. Mitchell & Co., and of the individual members of said firm, as of the thirty-first day of July, A. D. one thousand nine hundred thirteen, and all evidence given by the witness Fallon in regard to the values of the property held and owned by said T. Mitchell & Co. as a firm, or by any of the individual members of said firm, at said time or at any other time.

(g) The Court erred in admitting, on the cross-examination of the witness A. Bruning, evidence relative to any inquiries or investigations made or

not made by the officers of the defendant bank concerning the solvency or insolvency of the firm of T. Mitchell & Co., or any of the individuals constituting said firm.

(h) The Court erred in denying the defendant's motion for a non-suit at the close of the plaintiff's case.

(i) The Court erred in denying defendant's motion that the jury be directed to find a verdict in favor of the defendant, which motion was made at the close of all the testimony in the case.

(j) The Court erred in refusing to strike out plaintiff's exhibit 'G', the same being the undertaking of plaintiff in this action as trustee of the purported estate of T. Mitchell & Co.

(k) The Court erred in giving instruction No. 10, for the reason that no question of solvency or insolvency is involved in the case at bar, and is not, and could not be, involved in any issues arising out of the provisions of section sixty-eight of the Natinal Bankruptcy Act, relative to set-offs, and the right of set-off, under the National Bankruptcy Act, does not depend, in any degree or at all, upon any knowledge or belief of the party making such set-off, —in this case, the defendant bank,—as to whether or not the other party to the set-off is or is not insolvent, or whether or not the set-off would effect a preference in favor of the party making such set-off.

(l) The Court erred in giving instructions No. 13, for the reason that said instruction is an errone-

ous statement of the law, in that it limits the right of a bank to set off indebtedness of one of its customers against a deposit account "subject to check."

(m) The Court erred in refusing to give defendant's proposed instructions numbered, 2, 3, 11 12, 13, 14, 15, 17, 25, by this Court, and each of said proposed instructions.

(n) The Court erred in eliminating from defendant's proposed instruction partially given in this cause as instruction No. 8, the words "and also the nature of the transactions concerning the sale of the two cleanups theretofore sold to the bank by said T. Mitchell & Co., and the treatment by all parties of the proceeds of such sale, whether as deposits or otherwise, in the general account of said T. Mitchell & Co."

(o) The Court erred in striking from defendant's proposed instruction partially given in this cause as instruction No. 11, the words "and if you find from the evidence that the defendant in this case may have had some suspicion in regard to the insolvency of the firm of T. Mitchell & Co., that, in itself, is not sufficient."

(p) The Court erred in accepting the general verdict of the jury, for the reason that the jury in this cause did not unanimously agree upon a verdict in favor of the plaintiff upon the issues raised by the pleadings in this cause, and the special verdict rendered by said jury upon the questions propounded to them shows conclusively that the jury disagreed

upon two or more of the essential and material issues in the case which were submitted to them, and that, without a unanimous agreement on said two essential and material issues no valid general verdict could be rendered in favor of the plaintiff in this action.

JOHN K. BROWN
McGOWAN & CLARK
Attorneys for Defendant.

(Endorsed: "Due service hereof admitted this Nov 6 1915 Louis K. Pratt, T. A. Marquam, Attorneys for plaintiff. Filed in the District Court Territory of Alaska 4th Div. Nov 6 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

That thereafter, after argument, the Court overruled said motion for a new trial, to which order defendant then and there excepted and said exception was duly allowed. (Exception No. 47).

Exc. 47.

That thereafter defendant filed an objection to the entry of any judgment in favor of plaintiff, which objection was as follows, towit:

[Title of Court and Cause.]

Objection to Entry of Judgment in favor of Plaintiff.

Comes now the defendant in the above entitled cause and objects to the Court entering any judgment in favor of the plaintiff in this cause upon the alleged general verdict returned on the third day of November, A. D. one thousand nine hundred fifteen, by the jury empaneled to try the issues in said cause.

for the reasons that:

'(1) The jury in this cause did not unanimously agree upon a verdict in favor of the plaintiff upon the issues raised by the pleadings in this cause, and the special verdict rendered by said jury upon the questions propounded to them shows conclusively that the jury disagreed upon two or more of the essential issues in the case which were submitted to them, and that, without a unanimous agreement on said two essential and material issues, no valid general verdict could be rendered in favor of the plaintiff in this action.

(2) That the plaintiff's complaint does not set forth a cause of action against the defendant.

,JOHN K. BROWN
McGOWAN & CLARK,
Attorneys for Defendant.

(Endorsed: "Due service hereof admitted this Nov 6 1915 Louis K. Pratt, T. A. Marquam, Attorneys for Pltff. Filed in the District Court Territory of Alaska 4th Div. Nov 6 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

Which objection was overruled, and to the order overruling same defendant then and there excepted and said exception was allowed

Exc. 48.

That, subsequent to the rendition of the verdict and prior to the argument for a judgment notwithstanding the verdict, defendant moved the Court for an order permitting it to amend paragraph 1 of its

answer to plaintiff's amended complaint, to conform to the evidence in said cause, by changing the words therein "August 1st, 1913" to "July 31st, 1913"; to amend paragraph 4 of its affirmative answer, by changing the words "August 1st, 1913" to "July 31st, 1913"; and to amend paragraph 5 of its affirmative answer, by changing the words "August 1st. 1913" to "July 31st, 1913"; all on the ground that the evidence introduced showed that said "August 1st, 1913" was erroneously given in said complaint when it should have been "July 31st, 1913". The Court then and there denied said motion and refused said request to amend said complaint in the particulars above set forth; to which order and denial defendant then and there excepted and said exception was allowed.

Exc. 49.

And now, in furtherance of justice and that right may be done, the defendant in the above entitled cause, within the time allowed by law and the orders of this Court extending the defendant's time within which to prepare, serve, and file its bill of exceptions in this cause, herewith presents the foregoing bill of exceptions in the above entitled cause, and prays that the same may be settled, signed and allowed by the Judge of this Court, in the manner prescribed by law.

JOHN K. BROWN
McGOWAN & CLARK,
Attorneys for Defendant.

Due service of the within and foregoing bill of exceptions admitted this second day of February, A. D. one thousand nine hundred sixteen.

THOMAS A. MARQUAM,
and
LOUIS K. PRATT,
Attorneys for Plaintiff.

(Endorsed: "Filed in the District Court Territory of Alaska, 4th Div. Feb. 2, 1916. J. E. Clark Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Order Settling and Allowing Bill of Exceptions.

Be it remembered that, on the 21st day of February, A. D. one thousand nine hundred sixteen, the defendant, The American Bank of Alaska, a corporation, presented the foregoing bill of exceptions to the Court for settlement, which said proposed bill of exceptions was served and filed within the time allowed by law and the orders of this Court, and thereafter the plaintiff presented certain proposed amendments to said bill of exceptions so presented, and on the nineteenth day of February, A. D. one thousand nine hundred sixteen, said matter came up for hearing and said amendments, with certain modifications, were allowed, and said bill of exceptions has been amended to conform with the orders of this Court; and it appearing to the satisfaction of this Court, on examination of the said bill of exceptions as amended, that it contains a full, true, and correct

record of the proceedings in connection with said matters, and all the material evidence, including the exhibits introduced by the respective parties during the hearing of said cause; and the Court being fully advised in the premises:

Now, therefore, upon motion of the attorneys for the defendant, it is ordered that the foregoing bill of exceptions be, and the same is, hereby approved, allowed, and settled as the bill of exceptions in the above entitled cause, and made a part of the record herein, and that the same has been filed and presented within the time allowed by the orders of this Court, and that the clerk of this Court re-file said bill of exceptions as of this date.

Done, in open Court, at Fairbanks, Alaska, on this 21st day of February, A. D. one thousand nine hundred sixteen.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 13, page 411.

Endorsed: "Filed in the District Court Territory of Alaska 4th Div. Feb 21, 1916 J. E. Clark, Clerk, by L. F. Protzman, Deputy.")

[Title of Court and Cause.]

Judgment.

Now at this time, to-wit, October 30, 1915, the same being one of the days of the regular March 1915 term of this Court, this cause came on to be

heard before the Court and a jury, on the amended complaint, the answer and supplemental answer and the reply thereto, as on file. The plaintiff, G. Johnson, appeared in person and by Thomas A. Marquam and Louis K. Pratt, his attorneys, and the defendant appeared by Messrs. McGowan & Clark and John K. Brown, its attorneys. Evidence, both oral and documentary, was introduced on behalf of the plaintiff, and also the defendant, and after rebutting evidence both sides rested on the evening of November 3, 1915, said trial having been in progress from and during the 30th day of October to and including the 3rd day of November, 1915. The respective attorneys then argued the case to the jury, after which the jury was instructed in writing by the Court and afterwards retired in charge of sworn bailiffs to deliberate upon their verdict, and later in the day and on the evening of November 3, 1915, returned into open court and delivered their general verdict, as well as answers to special findings of fact which had been submitted to them for answer by the Court in addition to said general verdict. The said general verdict and special questions and answers, omitting the caption and title, were in the words and figures following:—

"We the jury, duly empaneled and sworn, do, from the law and evidence, find the issues joined herein in favor of the plaintiff George Johnson, Trustee, and assess the amount of his recovery against the defendant The American Bank of Alaska at the

sum of $3750.27.

Dated: Fairbanks, Alaska, November 3rd, 1915.

J. M. HARRIS,
Foreman."

"We, the jury, duly empaneled and sworn to try the issues in the above entitled cause, do, in accordance with the evidence and the instructions of this Court, make the following findings to the special interrogatories submitted to us, as follows, to-wit:

(1) Question: Did the American Bank of Alaska, on the thirty-first day of July, A. D. 1913, buy from Mitchell & Co., gold dust of the value of three thousand seven hundred thirty-four dollars and twelve cents ($3,734.12)?

Answer: Yes.

(4) Question: Did the defendant bank, at the time it set off the overdraft and over-due notes against the deposit account of Mitchell & Co., have reasonable cause to believe that the firm of Mitchell & Co. was insolvent?

Answer: Yes.

(5) Question: Did the defendant bank, at the time it set off the overdraft and overdue notes of Mitchell & Co., against their deposit account, have reasonable cause to believe that, by so doing, a preference would be thereby effected?

Answer: Yes.

J. M. HARRIS.
P. J. WENN.
DANIEL McCABE.

H. BUZBY.
JOHN PERLENDA.
A. H. KELLER.
J. A. LILLIE.
E. N. BLAKELY.
J. BELLERBY.
D. HARTWIG.
C. N. CREAMER.
A. C. WOLFF."

Dated: Fairbanks, Alaska, November 3rd, A.D. 1915.

And said general verdict and special findings being such as the Court would accept, the same were by the Court ordered filed with the papers in the cause. And upon motion of the plaintiff it was ordered, that judgment be entered in accordance therewith.

IT IS THEREFORE, CONSIDERED, ORDERED and ADJUDGED, by the Court, that the plaintiff, G. Johnson, Trustee, &c., do have and recover of and from the defendant, The American Bank of Alaska, a corporation, the sum of three thousand seven hundred and fifty dollars and twenty-seven cents ($3750.-27) so found to be due him from the defendant by the said verdict, and for his costs and disbursements amounting to $....., the same to be taxed by the Clerk for the collection of which let execution issue.

This judgment shall draw interest at the rate of eight percentum (8 per cent.) per annum from this date.

Dated at Fairbanks, Alaska, this 18th day of March, 1916.

CHARLES E. BUNNELL,
District Judge.

Entered in Court journal No. 13 page 460.

Received copy of foregoing March 8th 1916 McGowan & Clark, John K. Brown, Attys for deft.

(Indorsed: "Filed in the District Court Territory of Alaska 4th Div. Mar. 18 1916 J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Supplemental Bill of Exceptions.

Be It Remembered: That, subsequent to the time when the above-entitled Court overruled defendant's motion for a new trial and for judgment notwithstanding the verdict and defendant's objection to the entry of any judgment on the verdict rendered by the jury in said cause, to wit, on the 18th day of March 1916, plaintiff served upon the attorneys for the defendant and presented to the Court for signature the judgment thereafter signed and filed in this cause; that, prior to the signing and filing thereof, defendant objected to the signing thereof by the Court, for the reason that the special interrogatories No. Two and No. Three, submitted to the jury by the Court in said action and not answered by them, being in the words and figures following, to wit:

"(2) Question.—Were the proceeds of said purchase deposited to the general bank account of Mitch-

ell & Co., at the time of said purchase?

Answer.—.....

(3) Question.—Did the defendant bank, at the time it credited the value of said gold dust to the deposit account of Mitchell & Co., set off the amount of the overdraft due from Mitchell & Co., and their then past-due notes against said deposit account?

Answer.—.....

had not been included in said judgment, and objected to the signing of said judgment unless said special interrogatories were included therein and made a part thereof as a part of the special verdict filed by the jury in said cause; that said Court then and there overruled the objections of said defendant, and refused to order said special interrogatories, above set forth and which were returned by said jury unanswered, to be inserted in said judgment and made a part thereof; to which ruling of said Court defendant then and there duly excepted, and said exception was allowed by the Court.

Exc. 50.

That thereafter the Judge of the above entitled Court signed said judgment, and to the signing thereof this defendant then and there excepted and said exception was duly allowed.

Exc. 51.

And now, in furtherance of justice and that right may be done, the defendant in the above-entitled cause, within the time allowed by law, herewith presents the foregoing bill of exceptions in the above en-

titled cause, and prays that the same may be settled, signed, and allowed by the Judge of this Court in the manner prescribed by law.

JOHN K. BROWN
McGOWAN & CLARK,
Attorneys for Defendant

Due service of the within and foregoing bill of exceptions admitted this 1st day of April, A. D. 1916.

THOS. A. MARQUAM
LOUIS K. PRATT
Attorneys for Plaintiff

Indorsed: "Filed in the District Court Territory of Alaska, 4th Div. April 1, 1916. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Order Settling and Allowing Supplemental Bill of Exceptions.

Be it remembered that, on the 10th day of April, A. D. one thousand nine hundred sixteen, the defendant, The American Bank of Alaska, a corporation, presented the foregoing supplemental bill of exceptions to the Court for settlement, which said proposed bill of exceptions was served and filed within the time allowed by law and the orders of this Court, and the plaintiff not having proposed any amendments to said bill of exceptions so presented, and said matter coming on regularly for hearing upon defendant's application to have said bill of exceptions settled and allowed, plaintiff being represented by his

counsel, Louis K. Pratt, esq., and Thomas A. Marquam, esq., and the defendant by its counsel, John Knox Brown, esq., and Messrs McGowan & Clark, and it appearing to the satisfaction of this Court, upon examination of said bill of exceptions as amended, that it contains a full, true, and correct record of the proceedings relative to the signing of the judgment in this case and defendant's objections thereto, and that said proposed supplemental bill of exceptions is in all respects true and correct, and the Court being fully advised in the premises:

Now, therefore, upon motion of the attorneys for defendant, it is ordered that the foregoing supplemental bill of exceptions be, and the same is hereby, allowed, approved, and settled as a bill of exceptions in the above entitled cause, and made a part of the record herein, and that the same has been filed and presented within the time allowed by the orders of this Court, and that the clerk of this Court re-file said bill of exceptions with this order, as of this date.

Done in open Court at Fairbanks, Alaska, on this 10th day of April, A. D. one thousand nine hundred sixteen.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 13, page 501.

Indorsed: "Filed in the District Court Territory of Alaska 4th Div. Apr. 10, 1916. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Assignment of Error.

Comes now the defendant in the above entitled cause, being the plaintiff in error, an assigns the following error as having been committed by the above named Court on the trial of the above entitled cause, which error the said defendant intends to and does rely upon on defendant's writ of error to be prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California.

Pleadings and Procedure.

(1) The Court erred in overruling defendant's demurrer to plaintiff's amended complaint.

(2) The Court erred in refusing to direct the jury to bring in a verdict in favor of defendant upon defendant's motion at the close of plaintiff's case, and in denying defendant's motion for a directed verdict at said time. (Defendant's exception No. 32.)

(3) The Court erred in overruling defendant's motion for a non-suit at the close of defendant's case. (Defendant's exception No. 32.)

(4) The Court erred in overruling defendant's motion at the close of all the evidence to instruct the jury to bring in a verdict in favor of defendant, and in refusing defendant's motion at said time for a directed verdict. (Defendant's exception No. 42.)

(5) The Court erred in receiving the general and special verdicts of the jury when said jury failed to answer all the special interrogatories submitted to

them by the Court.

(6) The Court erred in discharging said jury before they had reached a unanimous verdict on each and all the special interrogatories submitted to them by the Court at defendant's instance.

(7) The Court erred in accepting the general verdict of said jury when the special verdict showed on its face that said jury disagreed on two at least of the essential elements necessary to be agreed upon before the said general verdict could be rendered, as shown by their failure to answer two of the special interrogatories submitted to them.

(8) The Court erred in overruling the defendant's motion to enter a judgment in favor of the defendant notwithstanding the verdict of the jury, and in refusing to enter the same. (Defendant's exception No. 46.)

(9) The Court erred in overruling defendant's motion for a new trial, and in refusing to grant a new trial. (Defendant's exception No. 47.)

(10) The Court erred in entering any judgment in favor of plaintiff on the general and special verdicts rendered by said jury, and in overruling defendant's objection to the entry of any judgment in favor of plaintiff on the verdict so rendered. (Defendant's exception No. 48.)

Admission of Evidence.

(11) The Court erred in admitting in evidence, over defendant's objection, plaintiff's exhibit "E",

purporting to be a notice of the appointment of G. F. Johnson as trustee in the matter of the estate of T. Mitchell & Co., bankrupts. (Defendant's exception No. 1.)

(12) The Court erred in admitting in evidence, over defendant's objection, plaintiff's exhibit "B", purporting to be an order for the appearance of Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, in the matter of T. Mitchell &. Company, a mining copartnership composed of Thomas Mitchell, James J. Fallon, and Herman Fawcett, bankrupts. (Defendant's exception No. 2.)

(13) The Court erred in admitting, over defendant's objection, plaintiff's exhibit "C", purporting to be the schedules in bankruptcy filed in the matter of T. Mitchell & Company, a mining copartnership composed of Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, bankrupts. (Defendant's exception No. 3.)

(14) The Court erred in admitting in evidence, over defendant's objection, the alleged adjudication of bankruptcy, entitled "In the matter of T. Mitchell & Company, a mining copartnership composed of Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, bankrupts," but the body thereof purporting to adjudicate the bankruptcy of Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, as individuals, there being no petition on file to have said individuals adjudged bankrupts, and said order of adjudication failing to adjudge the firm of T. Mitchell & Company bankrupt. (Defendant's exception No. 4.)

(15) The Court erred in admitting in evidence, over defendant's objection, plaintiff's exhibit "F", which purports to be an order of reference and is entitled "In the matter of the estate of T. Mitchell & Co., a mining copartnership composed of Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, bankrupts," and which recites in the body thereof that Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, had been adjudged bankrupts, and does not recite that the copartnership of T. Mitchell & Co. had been so adjudged. (Defendant's exception No. 5.)

(16) The Court erred in admitting in evidence over defendant's objection plaintiff's exhibit "G" and "G-1", being under one cover, purporting to be a notice of the appointment of a trustee, notice of acceptance of trustee, and undertaking of trustee, upon which is indorsed the approval of said undertaking by the referee in bankruptcy, all entitled "In the matter of Thomas Mitchell & Co., bankrupts", when there was no evidence before the Court showing that said Mitchell & Co. had ever been adjudged bankrupts, and all the evidence showed that, if there had been any adjudication in bankruptcy, it was the bankruptcy of the three individuals and not of the copartnership. (Defendant's exception No. 6.)

(17) The Court erred in overruling defendant's motion to strike from the record and the evidence plaintiff's exhibit "G-1", which was the undertaking included in the general exhibit "G" under one cover,

said undertaking being in form an undertaking for the administration of the estate of Mitchell, Fallon, and Fawcett, and not for the administration of the estate of T. Mitchell & Co. (Defendant's exception No. 7.)

(18) The Court erred in permitting the witness James J. Fallon, over defendant's objection, to testify as follows:

"Q. What were the assests of the partnership at the time of your commencing operations?

(Defendant objects as immaterial, not within the issues in the case. Objection overruled. Exception.)

A. My partners, Mr Fawcett and Mr Mitchell, didn't have much. They had their experience to put in and their labor to put up. I was working at the time and I furnished, to about the latter part of April, the money to keep the lease going financially. That is from the 18th of January until about the middle of April. That was during the period when we were opening up. Then we had to pump water there and it cost quite a bit of money, and thereafter I had to get assistance, which the bank loaned me. During that time all the financial assistance that the company had came from me; the other members had nothing but their experience as miners. They were willing to do right as a partnership should....." etc.

Which said evidence covered a period before any money had been loaned to the partnership by the bank and many months before the transaction oc-

curred which is the basis of the complaint in this action, and at a time when it was not claimed that said copartnership was insolvent. (Defendant's exception No. 8.)

(19) The Court erred in permitting the witness James J. Fallon, over defendant's objection, to testify as follows:

Q. What was the property that you had at that time?

Defendant objects as immaterial. Objection overruled. Exception.)

A. I had a side claim, No. Seven above, on Fairbanks Creek, right limit, the Fallon Bench. I had another piece, the Owl Association, a half interest in her, and Four above, on the right limit of Little Eldorado. That was my personal assets. I retained that many until the time of these bankruptcy proceedings." (Defendant's exception No. 9.)

Q. What became of it then?

(Defendant objects as immaterial. Objection overruled. Exception.)

A. That was put in the schedule. Defendant's exception No. 10.)

as both said questions were directed to the personal assets of one member of the copartnership when the copartnership was formed, many months before the occurrence of the transaction complained of in the complaint, and the basis of the action is not the bankruptcy of the individual members of the firm but of the copartnership itself.

(20) The Court erred in permitting the defendant Fallon, over defendant's objection, to testify as follows: (referring to the property heretofore testified to, that he owned at the time the copartnership was formed)

"Q. What was the value of that property on the 31st day of July 1913, that you have just described?

(Defendant objects as witness has testified to personal property belonging to himself as an individual and not to the copartnership. The question of the solvency or insolvency of the individual members of the copartnership is not before the Court at the present time, there being no contention that the individuals have ever been adjudged bankrupt. Objection overruled. Exception.

A. Well, I guess it is worth the same as it was down on the assets; a thousand for Fairbanks Creek, and five hundred for Little Eldorado.

as the question of the value of the assets of the individuals, under plaintiff's theory of the case, was not involved in said action, since the basis of his action was that the copartnership of T. Mitchell & Co. was the bankrupt, and there is no evidence to show that the individuals had ever transferred their own personal holdings to said copartnership. (Defendant's exception No. 11.)

(21) The Court erred in permitting the witness Fallon, over defendant's objection, to testify as follows:

"Q. When did you commence actual mining operations in the way of extracting gold in large quantities from the ground out of this lease or lay?

A. About the ninth of June.

Q. Prior to that time what debts had you incurred, Mr Fallon?

(Defendant objects as immaterial. Overruled. Exception.)

A. Well, probably—(interrupted)

Mr Clark: We object that it is not the best evidence if he has the books.

(No ruling on the objection.)

A. About fifteen hundred dollars.

The Court: What date was that?

Mr Marquam: At the time they commenced the excavation of dirt and removal of it to the surface.

Q. What date was that?

A. That was the ninth of June. That was the money that the copartnership owed me. The money that I had advanced for them. The company owed the American Bank at that time about four hundred dollars."

as said inquiry was directed to a period long prior to the time when it is claimed that T. Mitchell & Co. had been adjudged bankrupts and many months prior to the time of the occurrence of the transaction complained of in plaintiff's complaint. (Defendant's exception No. 12.)

(22) The Court erred in permitting the witness Fallon, over defendant's objection, to testify as fol-

lows:

"Q. Do you know how your account stood at the American Bank when you brought your first cleanup in?

A. We owed them about fourteen hundred dollars.

Q. Was their account taken out of the proceeds of the gold dust that you brought in at that time?

A. No; the checks were all honored.

Q. The checks for what?

A. For wages, and for merchandise too; any checks that were wrote out by me for the firm were honored.

Q. So your account at the bank, after the first cleanup, had been disposed of, stood just the same as it had before?

(Defendant objects as leading and suggestive. Overruled. Exception.)

A. I beg pardon.

Q. I understood the effect of your testimony to be that, after the disposition of the first cleanup or the proceeds thereof, your account at the bank stood the same as before the cleanup was brought in?

A. Yes, exactly."

as said transaction there referred to occurred many weeks before there was any claim that the firm was insolvent, and practically two months before the occurrence of the transaction complained of, and the question was leading, suggestive, and not the best evidence. (Defendant's exception No. 13.)

(23) The Court erred in permitting the witness Fallon, over defendant's objection, to testify as follows:

"Q. I will ask you, at that time, after the 31st day of July 1913, were you still an employer of labor? Did you contract any labor debts after that date?

A. None whatever. As shown by our schedule, we owed other accounts,—merchandise, etc., amounting to $7532.75, exclusive of labor bills.

Q. Now, with regard to your assets at that time, the assets of the firm of T. Mitchell & Co., your schedule shows: personal property—'(interrupted)

(Defendant objects as immaterial; that, if they are going to stand on the adjudication, they are bound by the adjudication. Plaintiff's attorney, Mr. Marquam, states that the adjudication that was made was that the firm was insolvent on the 25th of August 1913, and attention is now directed to a time 20 days earlier, at the time of the transaction with the bank. Objection overruled. Exception.)

A. We had, as shown by the schedules, property in the way of mining outfit amounting to $1786.00; that is the machinery and so forth on the claim on the 31st of July 1913 the assest and liabilities, as shown by the schedule, was the condition of the firm on the 31st day of July 1913. The firm had no other assets at that time."

as the evidence in the case had shown that the firm of T. Mitchell & Co. had never been adjudicated a bank-

rupt and the assets of the firm at that time, so far as this proceeding was concerned, was immaterial. (Defendant's exception No. 14.)

(24) The Court erred in permitting the witness Fallon, over defendant's objection, to testify as follows:

"Q. What was the condition of the assets or the property of the individual members of that copartnership? Had they increased any? Had yours increased any from the time you described a while ago when you commenced mining operations and told what property you had?

(Defendant objects as irrelevant, incompetent, and immaterial. Overruled. Exception.)

A. I didn't make anything.

Q. Had the condition of the other members, so far as property was concerned, changed any during that time?

A. No."

As, according to plaintiff's theory, the copartnership had been adjudged a bankrupt and not the individuals, and the condition of the individuals' property, so far as the present proceedings are concerned, would be absolutely immaterial. (Defendant's exception No. 15.)

(25) The Court erred in permitting the witness Fallon, over defendant's objection, to testify as follows:

"Q. To whom had you issued checks before this last cleanup?

(Defendant objects, as witness stated that he did not know he had any checks standing out. Overruled. Exception.)

A. What is it?

Q. To whom had you issued checks prior to this third cleanup and the time that you brought that in to the bank?

A. Well, labor and merchandise.

Q. Can you give us an idea of about how many checks, or the amount of the checks, you had issued between your second cleanup and your third cleanup?

Defendant objects as immaterial. Overruled. Exception.)

A. There was $3071.00 labor checks and $1800.00 —(interrupted)

Q. Were those outstanding at the time you brought this last cleanup in to the bank?

A. No sir, they were paid between the sixteenth and the thirty-first.

Q. Do you know how many were not paid; that were still outstanding?

A. No, I couldn't tell you that.

Q. Do you know whether there was a considerable amount or otherwise?

(Defendant objects as immaterial. Overruled. Exception.)

A. There must have been. From the 16th all the checks that were issued up to the second cleanup were honored; but after the second cleanup there was $6000.00—well, yes, there was about $4000.00

worth of checks that were not honored.

Q. That were not paid?

A. Yes.

Q. That could not be. If you can give us an idea from your data as to how many checks were outstanding that were not paid by the bank, why, give it to us.

'(Defendant objects as immaterial. Overruled. Exception.)

Q. I think you misunderstand the question. I want to know how many checks that you had issued in behalf of Mitchell & Co. were outstanding, that hadn't been paid by the bank on the 31st day of July 1913; can you give us some idea as to that?

A. About $2594.00"

as the question as to the amount of checks outstanding was absolutely immaterial, especially in view of the fact that this knowledge was not brought home to the defendant until after the set-off made by the defendant bank, the basis of this action. (Defendant's exceptions Nos. 17, 18, 19, 20.)

(26) The Court erred in permitting the witness Fallon, over defendant's objection, to testify as follows:

"Q. What, if anything, did you say to Mr Bruning, when you came in with this last cleanup, either that night or the next day, about things looking better out there?

(Defendant objects as not redirect-examination. Overruled. Exception.)

A. I told Mr Bruning, when he passed me the vouchers, the first thing I told him, I said: Mr Bruning, I am sorry that you have come to that conclusion, that you can not carry us any longer and honor these checks that I have made out for the men, as the ground is looking a little better, and I have no doubt that we will probably be able to get through, be able to square up everything. I told him that."

as the matters therein testified to were not proper on redirect examination and related to statements made subsequent to the time the bank had made the set-off complained of. (Defendant's exception No. 23.)

(27) The Court erred in permitting the witness Fallon, over defendant's objection, on redirect examination, to testify as follows:

"Q. Mr Bruning, as the result of that conversation (the conversation last referred to) knew that there were outstanding checks against his bank drawn by yourself for all the money that was owed by you to your workmen?

(Defendant objects as immaterial. Overruled. Exception.)

A. Exactly."

as this related to a conversation had subsequent to the time of the set-off complained of. (Defendant's exception No. 24.)

(28) The Court erred in permitting the introduction in evidence of the civil docket of the United States Commissioner's Court for Fairbanks Precinct, at a time when John K. Brown was on the stand as

a witness and over defendant's objection, after said witness had testified that, on the 31st day of July 1913, a case was filed in the Commissioner's Court entitled Rutherford & Widman vs. T. Mitchell & Co., as shown by the following:

Mr Marquam: We offer in evidence the docket entries with reference to the case of Rutherford & Widman against T. Mitchell & Co.

Mr Clark: We object, beyond the mere recital that the complaint was filed and the writ of attachment was issued; we think, beyond that, that it is not the best evidence in regard to any service, or anything of that kind.

(Defendant objects. Overruled. Exception.)

Mr Clark: That is, we object to all except that particular part.

The Court: Yes, it may be admitted and marked plaintiff's exhibit "H".

as the entries in the judgment docket are not the best evidence of the fact that was sought to be proven in said transaction, to wit, the levy of the notice of garnishment on the defendant herein. (Defendant's exception No. 25.)

(29) The Court erred in admitting in evidence, over defendant's objection, plaintiffs exhibits "I" and "J", which paper purport to be the return on a writ of attachment made by a deputy United States marshal, and an answer to a notice of garnishment, in a case entitled Rutherford & Widman vs. T. Mitchell & Co., introduced in evidence while deputy marshal

M. O. Carlson was on the stand as a witness, said papers never having been filed in the United States Commissioner's Court in which said action was pending and not being identified by the person who levied the same, and the only foundation for their introduction being the testimony of the witness that the return on the writ of attachment was in the handwriting of W. W. Fife, who was at one time a deputy marshal in the Fourth Judicial Division of the Territory of Alaska. (Defendant's exception No. 26.)

(30) The Court erred in admitting in evidence, over defendant's objection, while the witness John K. Brown, United States Commissioner and ex-officio Justice of the Peace, was on the stand, the complaint filed in a case in his Court, entitled Rutherford & Widman vs. T. Mitchell & Co., said complaint being marked plaintiff's exhibit "K". (Defendant's exception No. 27.)

(31) The Court erred in admitting in evidence, over defendant's objection, plaintiff's exhibit "L", which purported to be a writ of attachment, issued out of the United States Commissioner's Court at Fairbanks, Alaska, in a case entitled Rutherford & Widman vs. T. Mitchell & Co. (Defendant's exception No. 28.)

(32) The Court erred in permitting the witness Fawcett, over defendant's objection, to testify as follows: (referring to a time after the gold dust in question had been deposited with the American Bank of Alaska on 31 July 1913):

"Q. State to the jury what you went back to the bank for on this second occasion, about fifteen minutes after you had delivered the gold dust.

A. I heard that there was to be an attachment served against the gold dust, and I went in to find out whether anything could be done.

Q. Who did you understand was levying the attachment?

A. Jack Nelson.

(Defendant objects as hearsay. Overruled. Exception.)

(Defendant's exception No. 29.)

(33) The Court erred in permitting the witness Tony Liongavich, over defendant's objection, to testify as follows:

"My name is Tony Liongavich; I am a miner and worked during the summer on the Hoffman Bench for Mitchell & Co. I came to town about the 1st of August, at the same time these gentlemen brought in the last cleanup. I came on the same train, on the 31st of July.

Q. What was your purpose in coming to town?

(Objection as immaterial. Overruled. Exception.)

A. I came in to town to cash in my check."

there being no evidence that the American Bank of Alaska had any knowledge that said witness had a check, or that the check was presented to be cashed, at any time before the proceeds of the gold dust sold to the bank had been applied toward wiping out the indebtedness of T. Mitchell & Co. (Defendant's ex-

ception No. 30.)

(34) The Court erred in permitting the witness Fallon, testifying for plaintiff on redirect examination, over defendant's objection, to testify as follows:

"Q. Mr Fallon, during the month of July, while you were carrying on operations out there, what was the average number of men employed?

(Defendant objects as immaterial. Overruled. Exception.)

A. About fifty men—fifty to fifty-five."

There being no evidence to indicate that the defendant had knowledge of the number of men, or that said men had not been paid, and the number of the men employed being absolutely immaterial so far as the issues in this case are concerned. (Defendant's exception No. 31.)

(35) The Court erred in requiring the witness Bruning, over defendant's objection, on cross-examination, to answer the following questions:

"Q. When he came to the bank about banking operations with you, did you inquire of him as to what property he had?

(Defendant objects. Overruled. Exception.)

A. Mr Hurley was here at the time the original loan was made to Mr Fallon; it was not me.

Q. That don't answer my question. You said a while ago that Mr Fallon was the man that came there and made arrangements about doing banking business, didn't you?

A. Yes sir, the record will show that Mr Fallon

was there. Yes.

Q. Did you inquire of him?

A. I did not; Mr Hurley may have."

as said inquiry was not proper cross-examination and was directed to a time long prior to the time when it is alleged that the firm of T. Mitchell & Co. was insolvent. '(Defendant's exception No. 33.)

(36) The Court erred in requiring defendant's witness Bruning, on cross-examination, to testify, over defendant's objection, as follows:

"Q. How much were they behind (referring to Mitchell & Co.) at the end of the second cleanup?

(Defendant objects as immaterial and not proper cross-examination. Overruled. Exception.)

A. At the end of the day, on the 16th, they were $133.71 overdrawn."

as said matter was not brought out on direct examination and referred to a time long prior to the occurrence of the transaction in controversy, at a time when no claim was made that T. Mitchell & Co. were insolvent. (Defendent's exception No. 34.)

(37) The Court erred in compelling defendant's witness Bruning, on cross-examination, over defendant's objection, to testify as follows:

"Q. Run ahead a few days, to the eighteenth; what was the condition of the account on that day?

(Defendant objects as immaterial. Overruled Exception.)

A. At the end of the day on the eighteenth it shows an overdraft here of $527.69."

as the time therein referred to was long prior to the transaction in controversy, at a time when no claim was made that the firm of T. Mitchell & Co. was insolvent, and was at a time when the defendant bank was still loaning money to T. Mitchell & Co. (Defendant's exception No. 35.)

(38) The Court erred in compelling defendant's witness Bruning to testify on cross-examination, over defendant's objection, as follows:

"Q. Had you made any inquiry of these men (referring to the members of the copartnership of T. Mitchell & Co.) up to the 31st as to what property they had or what chance they had of paying anything outside of these mining operations?

(Defendant objects as immaterial. Overruled. Exception.)

A. No.

Q. You were depending altogether upon the success of that mining venture?

A. Certainly."

as said evidence was wholly immaterial and was intended to prejudice the jury and to convince them that the defendant bank was merely gambling when it loaned money to the firm of T. Mitchell & Co. (Defendant's exception No. 36.)

(39) The Court erred in requiring defendant's witness Bruning, on cross-examination, over defendant's objection, to answer the following question:

"Q. If you saw one or more of them (referring to checks passing through the bank) you knew that

that was for a labor debt from Mitchell & Co. to a laborer, didn't you?

A. No.

Q. Isn't it marked right on the check?

A. I don't know.

Q. Didn't I show them to you and didn't you look at them?

(Defendant objects as immaterial. Overruled. Exception.)

A. I saw some checks there; yes."

as the question was evidently intended to convince the jury that the bank knew of other indebtedness of the firm of Mitchell & Co., and that when they received the gold dust in question they applied it on Mitchell & Company's account for the purpose of securing a preference over other creditors. (Defendant's exception No. 37.)

(40) The Court erred in refusing to sustain defendant's objection to the question propounded to the defendant's witness Bruning on cross-examination, referring to the checks that were alleged to have been turned down by the defendant bank before the 31st day of July 1913, as follows:

"Q. Now, when that officer came in there with an attachment, you knew that the Independent Lumber Company has a claim of four hundred dollars and over, didn't you?

A. In the evening they served me with a garnishment.

Q. You knew it then, and you knew that before,

that Mr McLean had a check for four hundred dollars that you turned down and refused to pay, didn't you?

(Defendant objects on the ground that the witness has testified that he knew nothing about that. Overruled. Exception.)

Q. Didn't you know that?

A. I told you I did not know that McLean presented a check for four hundred dollars."

as no evidence has been introduced, or was introduced, to show any such transaction, and said question merely tended to prejudice the jury against the defendant. (Defendant's exception No. 38.)

Exceptions to Instructions Given and Refused.

(41) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury its proposed instruction as follows:

A deposit consists of the delivery by any person to a bank of money, or its equivalent, for the purpose of having the same retained by said bank, with the duty on the part of the bank to credit the person so leaving the money, or its equivalent, with said bank. Deposits may be general or special. In case of a general deposit, the moment the money is delivered to the bank it becomes the property of the bank and the relation of debtor and creditor then exists between the bank and the depositor, and the bank is thereupon liable to such person so depositing said money for the value thereof, and the person so depositing the same may withdraw the same in a variety

of ways, among which is drawing checks against said deposit, which checks the bank is obliged to pay unless, among other things, it has not sufficient funds to the credit of the drawer of the check to pay the whole check, or said bank has appropriated said money for payment of a debt from the depositor to the bank, or has a lien thereon for overdue indebtedness from the depositor to the bank, and the bank is not obligated in any way to pay orders against said deposit in whatsoever form they may be presented to the net credit balance standing on the books of the bank in favor of said depositor.

(Defendant's exception No. 43.)

(42) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

You are instructed that, if you find from the evidence in this case that the proceeds of the gold dust sold to the bank on the afternoon of 31 July 1913 were credited to the deposit account of T. Mitchell & Co. at the time of such sale, then the bank had an absolute right to set off the indebtedness of said T. Mitchell & Co. to it against the amount thus deposited, and such set-off could be made immediately upon the ascertaining of the amount of the purchase price of said gold dust and the crediting of the same to the deposit account of said T. Mitchell & Co., regardless of whether or not said T. Mitchell & Co. were insolvent, or whether or not, at the time of said set-off, the

bank had reasonable cause to believe that said T. Mitchell & Co. were insolvent.

(Defendant's exception No. 43.)

(43) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

The instructions given to you relative to preference and the right of a trustee in bankruptcy to recover a preference must be taken subject to the right of the bank to set off the deposits to the credit of an insolvent person or firm against the overdraft or notes of said bank due to said bank; and, in connection with the right of set-offs, I instruct you that, in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid.

(Defendant's exception No. 43.)

(44) The Court erred in refusing to instruct the the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

You are instructed that, if at the time of the insolvency of any person, firm, or corporation, said bankrupt has a deposit in a bank and is indebted to the bank for notes or overdrafts, the bank has an absolute right to set off the notes and overdrafts held by it against said account, and if the bank did not do so, it is the duty, under the bankruptcy law, of the referee in bankruptcy to ascertain the state of said

account and to strike said balance, and to set off said notes or overdrafts against said deposit account.

(Defendant's exception No. 43.)

(45) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

Money which is turned over to an officer of a bank without any request that it be kept separate from the other funds of the bank, and which is entered upon the books as a general deposit, and a certificate of deposit issued for the amount, or an entry thereof made upon the general account of such depositor, if he has an account with said bank, is a general deposit, and is not in any sense a special deposit. A deposit has been further defined as the thing or the sums received from the depositor, and a deposit in a bank is presumed to be a general deposit, in the absence of an agreement to the contrary. The purpose and terms of a deposit may be explicitly stated or the intention of the parties may be inferred from their declarations considered in connection with their conduct and all the circumstances.

(Defendant's exception No. 43.)

(46) The Court erred in refusing to instruct the jury and in overruling the defendant's motion to give to the jury defendant's proposed instruction as follows:

I instruct you that any delivery of money by a person to a bank, to be placed to his credit, is subject to

check within the meaning of said expression, unless received and accepted by said bank as a special deposit in some form, not to be drawn against by check, and the right to check against said account is not an absolute right, even though said money is deposited subject to check, unless, after the making of said deposit, there is a credit balance in favor of said depositor, after the payment of any overdrafts that said depositor may have had and the charging against said account of any matured or overdue notes held by such bank against said depositor, and his right to draw out a sum of money equal to the amount deposited is limited by the right of the bank to set off its indebtedness against said amount so deposited, as you have been heretofore instructed.

(Defendant's exception No. 43.)

(47) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

You are instructed that, where a bank holds a depositor's note, it has a right, at any time during the day on which said note falls due, or thereafter, to apply funds in its hands belonging to the maker of such note to the payment thereof, even where nothing will be left to the maker's credit to apply on checks.

(Defendant's exception No. 43.)

(48) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

I instruct you that the enforcement by a bank of

its lien or right of set-off by applying deposits, honestly made in the due course of business and without intent on the part of the depositor to prefer the bank, to the payment of the depositor's overdrafts and his notes in the bank's favor, as they mature, does not, although within four months of the bankruptcy proceedings against such depositor, constitute a preference forbidden by the National Bankruptcy Act, there being nothing in section 68 of said act which prevents the parties from voluntarily doing before the petition is filed what the section itself requires to be done after the proceedings in bankruptcy are instituted.

(Defendant's exception No. 43.)

(49) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

I instruct you that, if you are satisfied from the evidence in this case that the defendant bank made certain loans and permitted certain overdrafts to the firm of T. Mitchell & Co. between their second and third clean-ups, upon the promise and agreement on the part of the said T. Mitchell & Co. that they would deliver to said defendant bank the gold dust derived from the next cleanup, to secure or pay said loans and advances, then I instruct you that the transaction should be considered as the taking of security by said bank for a present loan or consideration, and the payment of said loan and advances by the delivery of said gold dust in accordance with the agreement, if

you find such agreement was had, is not such a payment as would constitute a preference in the contemplation of the National Bankruptcy Act.

(Defendant's exception No. 43.)

(50) The Court erred in giving to the jury its instruction No. 10, which was as follows:

The Court instructs the jury that the word "insolvent" as used in the pleadings in this case, means that on the 31st day of July, 1913, the aggregate of all the property belonging to the copartnership firm of T. Mitchell & Co., and that of T. Mitchell, J. J. Fallon, and Herman Fawcett, the individuals composing such firm, was not sufficient at a fair valuation to pay the debts of such copartnership firm.

The phrase "reasonable cause to believe the transfer would effect a preference" means, as applied to the pleadings and evidence in this case, that at the time of such set-off by the defendant bank, some one or more of its officers had knowledge concerning the financial affairs of said copartnership firm of T. Mitchell & Co., sufficient to induce the belief in their minds of the insolvency of said firm, and that such set-off would effect a preference in its favor over other creditors. Actual knowledge of insolvency and that the set-off would enable the bank to get a greater percentage of its debt than other creditors of the same class might or could get, is not necessary or required under the bankruptcy law, but "reasonable cause to believe" such insolvency and preference is

all that the plaintiff is bound to establish by a preponderance of the evidence.

and in overruling defendant's objection thereto, which was as follows:

Excepts to Instruction No. 10 given by the Court, for the reason that no question of solvency or insolvency is involved in the case at bar, and is not, and could not be, involved in any issue arising out of the provisions of section 68 of the National Bankruptcy Act, relative to set-offs; and the right of set-off, under the National Bankruptcy Act, does not depend, in any degree or at all, upon any knowledge or belief of the party making such set-off,—in this case the defendant bank,—as to whether or not the other party to the set-off is or is not insolvent, or whether or not the set-off would effect a preference in favor of the party making such set-off.

(Defendant's exception No. 44.)

(51) The Court erred in giving to the jury its instruction No. 13, which was as follows:

If the jury finds from the evidence that on the 31st of July, 1913, the firm of T. Mitchell & Company did not make a deposit subject to check as hereinafter defined to you in these instructions, but did make a payment of a past due indebtedness, and that at that time the firm of Mitchell & Company was insolvent, and that said defendant bank had reasonable cause to believe that by accepting a payment it would secure an unlawful preference and by so doing would secure a larger percentage of its debt than other creditors of the same class, then I instruct you such a payment, if you find it to be a payment, would be an un-

lawful preference, and your verdict should be for the plaintiff.

and in overruling defendant's objection thereto, which was as follows:

Excepts to Instruction No. 13 given by the Court, for the reason that said instruction is an erroneous statement of the law, in that it limits the right of a bank to set off indebtedness of one of its customers against a deposit account "subject to check."

(Defendant's exception No. 44.)

(52) The Court erred in refusing to give, as a part of Instruction No. 8, (which was a part of the instructions proposed by the defendant,) and which instruction, as given, was as follows:

You are instructed that, in considering whether or not a deposit in the general account of T. Mitchell & Company was made in the defendant bank on the afternoon of July 31st, 1913, you have a right to consider all the circumstances connected with the transaction.

the additional portion thereof, eliminated by the Court, which followed immediately after the word "transaction" in the instruction as given, and which said additional portion read as follows:

And also the nature of the transaction concerning the sale of the two clean-ups theretofore sold to the bank by said T. Mitchell & Co., and the treatment by all parties of the proceeds of such sale, whether as deposits or otherwise, in the general account of said T. Mitchell & Co."

(Defendant's exception No. 45, c)

(53) The Court erred in refusing to give and in eliminating from defendant's proposed instruction, partially given in this cause as Instruction No. 11, after the words "debtor's insolvency", the following clause, to wit:

And if you find from the evidence that the defendant in this case may have had some suspicion in regard to the insolvency of the firm of T. Mitchell & Co., that, in itself, is not sufficient.

Said instruction as given, after the elimination of said clause being as follows:

I instruct you that the burden is on the plaintiff in this action to prove by a preponderance of the evidence every essential fact necessary to constitute his cause of action, and if you find that the evidence introduced by the plaintiff to prove any of the material allegations of his complaint merely creates a suspicion or doubt in your minds but does not satisfy your minds by a preponderance of evidence, then you are to disregard said evidence if unsupported by evidence that does produce conviction; and I further instruct you that a transfer can not be avoided simply on proof that the creditor had doubt or suspicion that a preference was intended, for it is not enough that the creditor has some cause to suspect the insolvency of the debtor, but he must have such knowledge of fact as to induce a reasonable belief of his debtor's insolvency. And if the evidence introduced by the plaintiff in regard to knowledge or information pos-

sessed by the defendant shows that the defendant in this action may have had some suspicion in regard to the insolvency of T. Mitchell & Company, but that it did not have any reasonable cause to believe that the deposit made by said T. Mitchell & Company, if you find that such a deposit was so made by said T. Mitchell & Company, would effect a preference in favor of said bank, then I instruct you that your verdict must be for the defendant.

(Defendant's exception No. 45, d.)

Amendment of Answer.

(54) The Court erred in refusing, subsequent to the rendition of the verdict and prior to the argument for a judgment notwithstanding the verdict, and the motion for a new trial, to permit the defendant to amend paragraph 1 of its answer to plaintiff's amended complaint to conform to the evidence in said cause, by changing the words of the date therein when said set-off was made against said account from "1 August 1913" to 31 July 1913, and to amend paragraph 4 of its affirmative answer to conform to the evidence, by changing the words "I August 1913" to "31 July 1913," and to amend paragraph 5 of its affirmative answer to conform to the evidence, by changing the words "I August 1913" to "31 July 1913"; all on the ground that the evidence introduced showed that the date "1 August 1913" was erroneously given in said answer when it should have been "31 July 1913." (Defendant's exception No. 49.)

Form of Judgment.

(55) The Court erred in refusing to cause to be

inserted in the formal judgment entered in this cause, as a part of the verdict of the jury therein set forth, special interrogatories No. 2 and No. 3, which were unanswered by the jury, and upon which interrogatories the jury disagreed and failed to answer and returned into Court unanswered, said interrogatories being as follows:

(2) Question. Were the proceeds of said purchase deposited to the general bank account of Mitchell & Co., at the time of said purchase?

Answer. .....

(3) Question Did the defendant bank, at the time it credited the value of said gold dust to the deposit account of Mitchell & Co., set off the amount of the overdraft due from Mitchell & Co., and their then past-due notes against said deposit account?

Answer. .....

(Defendant's exception No. 50.)

Dated at Fairbanks, Alaska, on this 12 day of April, A. D. one thousand nine hundred sixteen.

JOHN K. BROWN

McGOWAN & CLARK,

Attorneys for Defendant and Plaintiff in Error

Due service of the foregoing is hereby admitted this 12th day of April, 1916.

THOMAS A. MARQUAM

LOUIS K. PRATT

Attorneys for Plaintiff and Defendant in Error

(Indorsed: "Filed in the District Court Territory of Alaska 4th Div. April. 12, 1916 J. E. Clark Clerk by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Petition for Writ of Error.

The American Bank of Alaska, a corporation, defendant in the above entitled action, feeling itself aggrieved by the general verdict of the jury rendered herein on the 3d day of November, 1915, and the special verdict of said jury on special findings of fact likewise returned and filed herein on said 3d day of November 1915, and the judgment of the Court made and entered herein in pursuance of said verdict on the 18th day of March 1916, against the defendant herein, for the sum of three thousand seven hundred fifty and 27-100 dollars and for costs of suit.

Now comes Messrs. McGowan & Clark and John Knox Brown, Esq., attorneys for defendant, and petition this honorable Court for an order allowing said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, according to the laws in that behalf made and provided;

And whereas said defendant desires a stay of execution pending the hearing of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit;

Now, therefore, said defendant petitions that an order be made, fixing the amount of the security which shall be given and furnished on the said writ

of error to cover the costs incurred therein and as a supersedeas, and that, on the giving of such security, all further proceedings of this Court herein may be suspended and stayed, until the determination of said writ of error by said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

JOHN K. BROWN,
McGOWAN & CLARK,
Attorneys for Defendant.

Due service hereof admitted this Apr. 12, 1916.

THOMAS A. MARQUAM,
and
LOUIS K. PRATT,
Attorneys for Plff.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., Apr. 12, 1916. J. E. Clark, Clerk. by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Order Allowing Writ of Error and Fixing Supersedeas and Cost Bond.

On motion of Messrs. McGowan & Clark, and John Knox Brown, attorneys for defendant, and the filing of a petition for writ of error and assignment of error, it is hereby ordered that a writ of error be, and the same is hereby, allowed, to have reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, the judgment

heretofore made and entered herein on the 18th day of March 1916, and that the amount of the bond on said writ of error be, and the same is hereby, fixed at the sum of five thousand ($5,000.00) dollars, to cover supersedeas and costs of defendant in error.

Done at Fairbanks, Alaska, on this 12 day of April 1916.

CHARLES E. BUNNELL,
District Judge.

Due service hereof admitted this 12 day of April 1916.

THOMAS A. MARQUAM,
and
LOUIS K. PRATT,
Attorneys for Plaintiff.

Entered in Court Journal No. 13, Page 508.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div. Apr 12, 1916 J. E. Clark, Clerk, By Sidney Stewart, Deputy.")

[Title of Court and Cause.]

ORDER RELATIVE TO SUPERSEDEAS BOND ON WRIT OF ERROR.

The defendant having on this day filed its petition for writ of error from the verdict and judgment thereon made and entered herein on the 18th day of March 1916 to the United States Circuit Court of Apeals for the Ninth Circuit at the City of San Francisco, State of California, to-

gether with an assignment of error, within due time, and also praying that an order be made, fixing the amount of security which defendant shall give and furnish on said writ of error, and that, on the giving of such security, all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the said Circuit Court of Appeals, and said petition having been this day duly allowed and supersedeas and cost bond fixed;

Now, therefore, it is ordered that, upon defendant filing with the clerk of this Court a good and sufficient bond in the sum of five thousand ($5,000.00) dollars, conditioned as a cost and supersedeas bond, all as provided by law, which said bond shall be approved by this Court, then and thereafter all proceedings in this Court shall be, and they are, suspended and stayed until the determination of said writ of error by the said Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California.

Dated at Fairbanks, Alaska, this 12th day of April, A. D. one thousand nine hundred sixteen.

CHARLES E. BUNNELL,
District Judge.

Due service of the foregoing order admitted this 12 day of April, 1916.

THOMAS A. MARQUAM,
and
LOUIS K. PRATT,
Attorneys for Plaintiff.

Entered in Court Journal No. 13, Page 508.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., Apr. 12, 1916. J. E. Clark. Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Writ of Error.

United States of America,
Territory of Alaska,—ss:

The President of the United States of America to the Honorable Charles E. Bunnell, Judge of the United States District Court for the Territory of Alaska, Fourth Judicial Division, Greeting:

Because in the records and proceedings, as also in the rendition of a judgment, dated the eighteenth day of March, A. D. one thousand nine hundred sixteen, of a plea which is in said United States District Court for the Territory of Alaska, Fourth Judicial Division, before you, between G. Johnson, as Trustee in Bankruptcy in the Matter of T. Mitchell & Co., a mining copartnership consisting of Thomas Mitchell, Jas. J. Fallon, and Herman Fawett, Bankrupts, as plaintiff, and The American Bank of Alaska, a corporation, as defendant, manifest error hath happened, to the great prejudice and damage of said American Bank of Alaska, as is said and appears in the petition herein;

We, being willing that error, if any hath been, shall be duly corrected and full and speedy justice

done to the parties aforesaid in this behalf, do command you, if said judgment be therein given, then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, together with this writ, so as to have the same at said place, in said Circuit Court, on the 12 day of May, A. D. one thousand nine hundred sixteen, that, the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct such error what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 12 day of April, A. D. one thousand nine hundred sixteen.

Attest my hand and the seal of the United States District Court for the Territory of Alaska, Fourth Judicial Division at the Clerk's office in the town of Fairbanks, Alaska on this 12 day of April, A. D. one thousand nine hundred sixteen.

(Seal.) J. E. CLARK,

Clerk of the District Court for the Territory of Alaska, Fourth Division.

Allowed this 12 day of April, A. D. one thousand nine hundred sixteen.

CHARLES E. BUNNELL,
Judge of the District Court for the Territory of Alaska, Fourth Division.

Due service of the foregoing writ of error admitted this 12 day of April, A. D. one thousand nine hundred sixteen.

THOMAS A. MARQUAM,
and
LOUIS K. PRATT,
Attorneys for Defendant in Error.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., April 12 1916. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")
[Title of Court and Cause.]

Citation on Writ of Error.

The President of the United States of America to G. Johnson, as Trustee in Bankruptcy in the Matter of T. Mitchell & Co., a mining copartnership consisting of Thomas Mitchell , Jas. J. Fallon, and Herman Fawcett, Bankrupts, and to Louis K. Pratt, Esq., and Thomas A. Marquam, Esq., his Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City and County of San Francisco, State of California, within thirty days from the date of this citation, pursuant to the writ of error filed in the office of the Clerk of the United States District

Court for the Territory of Alaska, Fourth Judicial Division, wherein the American Bank of Alaska, a corporation, is plaintiff in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in error in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, on this twelfth day of April, A. D. one thousand nine hundred sixteen, and in the year of our Independence the one hundred fortieth.

Attest my hand and the seal of the above-named District Court, at Fairbanks, Alaska, on this twelfth day of April, A. D. one thousand nine hundred sixteen.

(Seal.) CHARLES E. BUNNELL,
District Judge.

Due service of the foregoing citation admitted this 12 day of April, A. D. one thousand nine hundred sixteen.

THOMAS A. MARQUAM,
and
LOUIS K. PRATT,
Attorneys for Defendant in Error.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., Apr. 12, 1916. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Supersedeas Bond on Writ of Error.

Know all men by these presents that we, The American Bank of Alaska, a corporation, as principal, and A. Bruning, and Paul Hopkins, as sureties, are held and firmly bound unto the defendant in error, G. Johnson, as Trustee in Bankruptcy in the Matter of T. Mitchell & Co., a mining copartnership consisting of Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, Bankrupts, in the just and full sum of five thousand ($5,000.00) dollars, to be paid to the said defendant in error, his successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, successors in interest, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12 day of April, A. D. one thousand nine hundred sixteen.

Whereas, on the eighteenth day of March, A. D. one thousand nine hundred sixteen, in the United States District Court for the Territory of Alaska, Fourth Judicial Division, a judgment was rendered against said The American Bank of Alaska, a corporation, and the said defendant having obtained a writ of error and filed a copy thereof in the office of the Clerk of said Court, to reverse the judgment aforesaid, and a citation directed in said action to G. Johnson, as Trustee in Bankruptcy in the Matter of T. Mitchell & Co., a mining copartnership consisting of Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, Bankrupts, citing and

admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, on the 12 day of May, A. D. one thousand nine hundred sixteen and whereas the plaintiff in error desires a stay of execution in the above entitled action pending the above mentioned appeal, now the condition of the foregoing obligation is such that, if the said The American Bank of Alaska, a corporation, shall prosecute said writ of error to effect and answer and pay all judgments, damages, and costs, if it fail to make its said plea good, then the foregoing obligation to be void, otherwise to remain in full force, effect, and virtue.

THE AMERICAN BANK OF ALASKA,
Princial.
By C. J. HURLEY.
A. BRUNING, Surety.
PAUL HOPKINS, Surety.

United States of America,
Territory of Alaska,—ss:

A. Bruning and Paul Hopkins, being first duly sworn according to law, each for himself and not one for the other on his oath deposes and says: I am one of the sureties on the foregoing bond; I am not an attorney at law, United States marshal, deputy marshal, clerk, commissioner, or other officer of any Court, and I am worth the sum of five

thousand ($5,000.00) dollars, over and above all my just debts and liabilities, in property not exempt from execution.

A. BRUNING.
PAUL HOPKINS.

Subscribed and sworn to before me this 12 day of April 1916.

(Seal.) JOHN A. CLARK,
Notary Public in and for the Territory of Alaska.

My commission expires Apr. 24, 1918.

Approved this 14th day of April, 1916.

CHARLES E. BUNNELL,
District Judge.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., Apr. 14, 1916. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Designation of Place for Hearing of Writ of Error.

To the Honorable Charles E. Bunnell ,Judge of the above-entitled Court, and to the Plaintiff and his Attorneys:

Comes now the defendant, plaintiff in error, in the above entitled cause, and, pursuant to the provisions of the act of Congress, giving the designation of the place of hearing on writs of error to the plaintiff in error, does hereby designate the city and county of San Francisco, State of California, as the place for the hearing of the writ of error in the above entitled action.

Dated at Fairbanks, Alaska on this 12 day of April, A. D. one thousand nine hundred sixteen.

JOHN K. BROWN,
McGOWAN & CLARK,
Attorneys for Defendant.

Due service of the foregoing is hereby admitted this 12 day of April, A. D. 1916.

THOMAS A. MARQUAM,
and
LOUIS K. PRATT,
Attorneys for Plaintiff.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., Apr. 12, 1916. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Order Extending Time Within Which to File and Docket Cause on Writ of Error.

This matter coming on for hearing on the motion of the defendant above named, the plaintiff in error, for an order extending the time within which to file and docket the record herein on writ of error with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, and it appearing to the satisfaction of this Court that the time allowed by law and the orders of this Court allowing said writ of error is insufficient for the purpose, that the transcript and record is to be printed at Fairbanks, Alaska, and that the plaintiff in error desires an

extension to time until and including the thirty-first day of July, A. D. one thousand nine hundred sixteen, within which to file and docket said cause as aforesaid, and all and singular the matters being fully understood and considered by this Court.

It is therefore ordered that the plaintiff in error be, and it is hereby, given and granted until and including the thirty-first day of July, A. D. one thousand nine hundred sixteen, within which to file and docket its record on writ of error with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California.

Done in open Court at Fairbanks, Alaska, on this 12 day of April, A. D. one thousand nine hundred sixteen.

CHARLES E. BUNNELL,
District Judge.

Due service hereof admitted this Apr. 12, 1916.

THOMAS A. MARQUAM,
and
LOUIS K. PRATT,
Attorneys for Plff's

Entered in Court Journal No. 13 Page 509.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., Apr. 12, 1916. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

In The District Court For The Territory of Alaska, Fourth Division.

Clerk's Certificate to Record.

United States of America,
Territory of Alaska,
Fourth Division.—ss:

I, J. E. CLARK, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing consisting of 264 pages, numbered from 1 to 264, inclusive, constitute a full, true and correct transcript of the record on Writ of Error in cause No. 2011, entitled, G. Johnson as trustee in bankruptcy, in the matter of T. Mitchell & Company a mining copartnership, consisting of Thomas Mitchell, James J. Fallon and Herman Fawcett, bankrupts, Plaintiff, vs. The American Bank of Alaska, a corporation, Defendant, wherein The American Bank of Alaska, a corporation, is Plaintiff in Error, and G. Johnson as Trustee in bankruptcy in the Matter of T. Mitchell & Company a mining co-partnership, consisting of Thomas Mitchell, James J. Fallon and Herman Fawcett, Bankrupts, are Defendants in Error, and was made pursuant to and in accordance with the Praecipe of the defendant and Plaintiff in Error, filed in this action and made a part of this Transcript, and by virtue of the Citation issued in said cause, and is the return thereof in accordance therewith.

And I do further certify that the Index thereof, consisting of pages numbered i to iii is a correct Index

of said Transcript of record; also that the costs of preparing said transcript and this certificate, amounting to eighty-one & 50-100 Dollars ($81.50) has been paid to me by counsel for Plaintiff in Error in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 19th day of May, A. D. 1916.

(SEAL)

J. E. CLARK,
Clerk of District Court
Territory of Alaska,
Fourth Division.